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ARTICLES

REFORM OF DEFENSE REPRESENTATION IN CAPITAL CASES: THE INDIANA EXPERIENCE AND ITS IMPLICATIONS FOR THE NATION

NORMAN LEFSTEIN*

INTRODUCTION

In order to achieve just results in criminal cases, we expect well-trained and adequately-supported professional prosecutors, equally talented and well-financed defense lawyers, and impartial judges and juries. This adversary system is supposed to protect not only O.J. Simpson, but also the thousands of indigent defendants in the United States who lack Simpson's resources. There is convincing evidence, however, that in the most serious criminal prosecutions—cases in which the death penalty is sought—the defendant's legal representation at trial is oftentimes woefully inadequate and that the quality of counsel can make a difference in the outcome of the case.

Although the American Bar Association has urged that states adopt rules or standards for the delivery of defense services in capital cases,[1] only a few states have actually done so.[2] Indiana, by virtue of a new Supreme Court rule that

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1. *See* GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (American Bar Ass'n 1989).

2. In addition to Indiana, Ohio and Virginia have approved rules for the defense of death penalty cases. *See* OHIO C.P. SUP. R. 65 and VA. CODE ANN. § 19.2-163.7 (Michie 1995). Also, the Oklahoma Indigent System Board has adopted, on an interim basis, the American Bar Association Guidelines for the Appointment of Counsel in Death Penalty Cases. *See* Robert D. Ganstine, Executive Director, Oklahoma Indigent Defense System, Questionnaire for Qualification of Appointment of Counsel in Capital Cases (Oct. 1993) (on file with author) [hereinafter

became effective January 1, 1992,[3] is one of the few states that has made a significant effort to improve the quality of representation in death penalty cases. The Indiana rule, moreover, appears to do a better job of securing the right of the indigent capital defendant to an effective lawyer than any other such rule in the country.

After discussing the status of capital defense representation nationwide, this Article explains the content of Indiana's new rule and its development. The Article then reviews the rule's surprising impact on the prosecution and defense of Indiana death penalty cases and its cost. In addition, the Article compares the Indiana rule with similar rules adopted in other states, particularly the Ohio rule, which preceded the Indiana rule by several years. In a concluding section, the Article suggests that Indiana's experience has important implications for the constitutional foundations on which the death penalty rests.

I. A BRIEF OVERVIEW: REPRESENTATION IN DEATH PENALTY CASES

On June 30, 1994, in one of his last opinions as a member of the United States Supreme Court, Justice Blackmun summarized the situation confronting defendants in death penalty prosecutions as follows:

> The unique, bifurcated nature of capital trials and the special investigation into a defendant's personal history and background that may be required, the complexity and fluidity of the law, and the high, emotional stakes involved all make capital cases more costly and difficult to litigate than ordinary criminal trials. Yet, the attorneys assigned to represent indigent capital defendants at times are less qualified than those appointed in ordinary criminal cases. . . .
>
> Two factors contribute to the general unavailability of qualified attorneys to represent capital defendants. The absence of standards governing court-appointed capital-defense counsel means that unqualified lawyers often are appointed, and the absence of funds to compensate lawyers prevents even qualified lawyers from being able to present an adequate defense. Many States that regularly impose the death penalty have few, if any, standards governing the qualifications required of court-appointed capital defense counsel. . . .
>
> In addition to the lack of standards, compensation for attorneys representing indigent capital defendants often is perversely low. Although a properly conducted capital trial can involve hundreds of hours of investigation, preparation, and lengthy trial proceedings, many States severely limit the compensation paid for capital defense. . . .

Questionnaire]. *See also infra* notes 58-61 and accompanying text.

3. IND. R. CRIM. P. 24. The rule was originally effective January 1, 1990, and the amendments became effective on January 1, 1992 and February 1, 1993.

> Court-awarded funds for the appointment of investigators and experts often are either unavailable, severely limited, or not provided by state courts. As a result, attorneys appointed to represent capital defendants at the trial level frequently are unable to recoup even their overhead costs and out-of-pocket expenses, and effectively may be required to work at minimum wage or below while funding from their own pockets their client's defense .... The prospect that hours spent in trial preparation or funds expended hiring psychiatrists or ballistics experts will be uncompensated unquestionably chills even a qualified attorney's zealous representation of his client.[4]

Justice Blackmun's description of capital defense representation is not new; there have been numerous articles and reports that have documented the horrendous problems confronted by defendants in securing adequate representation in death penalty cases. His is only one of the more recent and most respected voices to call for reform.

For example, in 1990 *The National Law Journal* published a special report on death penalty representation in the southern states of Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas. The report identified all of the problems discussed by Justice Blackmun, including inexperienced lawyers, no standards for the selection of counsel, grossly inadequate fee structures, the unavailability of funds for investigators and experts, and often minimal evidence presented to the jury in mitigation during the penalty phase.[5]

The problems incident to defense representation in death penalty cases are not confined to the Deep South. A 1992 report of the Death Penalty Information Center describes capital defense representation in Philadelphia as lacking any "organized defense system to provide training or support to defend capital cases—neither a public defender system nor a capital resource center, leaving ill-trained, often ill-prepared, and inexperienced lawyers to handle the most demanding criminal cases of all ...."[6] Further, the report notes that very little money is available for experts and, consequently, "many of the most qualified and respected in those professions[,] [psychologists, psychiatrists, social history investigators,] refuse to provide their services under those circumstances."[7]

A 1993 report of the American Bar Association noted: "Insufficient compensation has its most profound consequences in capital cases. A recent study prepared for the Virginia General Assembly and the Virginia State Bar concluded that, after taking into account attorneys' overhead expenses, the effective annual hourly rate paid to Virginia counsel representing indigent capital defendants was

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4. McFarland v. Scott, 114 S. Ct. 2785, 2785-87 (1994) (Blackmun, J., dissenting).

5. *Special Report*, NAT'L L.J., June 11, 1990, at 1.

6. MICHAEL KROLL, *Introduction* to DEATH PENALTY INFORMATION CENTER, JUSTICE ON THE CHEAP: THE PHILADELPHIA STORY (1992).

7. *Id. See also* Andrew Blum, *Defense of Indigents: Crisis Spurs Lawsuits*, NAT'L L.J., May 15, 1995, at A1, A26 (discussing the problem that the lack of funding can have on an indigent's legal representation).

$13."[8]

In Indiana, prior to the reforms for providing counsel in death penalty cases discussed in this Article, there was considerable evidence of significant problems in capital representation. For example, in 1984 the Seventh Circuit Court of Appeals reversed an Indiana death penalty case, noting defense counsel's lack of preparation, unfamiliarity with the case, and inexperience.[9] As the court observed, "[defense counsel's] almost nonexistent effort to avoid the death penalty once [the defendant's] guilt was established is incomprehensible and was extremely prejudicial to [the defendant]."[10]

In a subsequent case, the Indiana Supreme Court reversed a capital murder conviction due to ineffective assistance of counsel.[11] Defense counsel's final argument was characterized by the Supreme Court as "reprehensible" because it seemed primarily to suggest to the jury that it would be "personally inconvenient" for defense counsel if a guilty verdict were returned:[12]

> Now, there are several things you can do. You can find him guilty of murder. And then we all get to come back, don't we, for that other hearing that we talked about earlier. So you can do that. Ruin my afternoon, possibly even all day tomorrow. I don't know. That's one of your possibilities. The other possibility you have . . . would be to find him guilty of something other than that. . . . And I don't have to tell you that you don't have to be geniuses to figure out that you can do that.[13]

At another point defense counsel referred to his client as a "street person" whom "I don't even like . . . ."[14]

The most exhaustive review of the problems incident to providing defense representation in capital cases is contained in a 1994 article published in the *Yale Law Journal*.[15] After describing outrageous examples of deficient defense representation reminiscent of those from Indiana cases described above, the author—a nationally known capital defense litigator—suggests the following conclusions:

> In these examples, imposition of the death penalty was not so much the result of the heinousness of the crime or the incorrigibility of the defendant—the factors upon which the imposition of capital punishment

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8. AMERICAN BAR ASS'N, THE INDIGENT DEFENSE CRISIS 7 (1993). *See also* THE SPANGENBERG GROUP, A STUDY OF REPRESENTATION IN CAPITAL CASES IN VIRGINIA (1993).

9. Dillon v. Duckworth, 751 F.2d 895, 900-01 (7th Cir. 1984).

10. *Id.* at 901.

11. Burris v. State, 558 N.E.2d 1067 (Ind. 1990).

12. *Id.* at 1073.

13. *Id.*

14. *Id.*

15. Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994). The article's author is the Director of the Southern Center for Human Rights and has been an active death penalty litigator since 1979.

supposedly is to turn—but rather of how bad the lawyers were . . . .

> There are several interrelated reasons for the poor quality of representation in these important cases. Most fundamental is the wholly inadequate funding for the defense of indigents. As a result, there is simply no functioning adversary system in many states. Public defender programs have never been created or properly funded in many jurisdictions. The compensation provided to individual court-appointed lawyers is so minimal that few accomplished lawyers can be enticed to defend capital cases. Those who do take a capital case cannot afford to devote the time required to defend it properly. As a result, the accused are usually represented by lawyers who lack the experience, expertise, and resources of their adversaries on the prosecution side . . . .
>
> Although it is widely acknowledged that at least two lawyers, supported by investigative and expert assistance, are required to defend a capital case, some of the jurisdictions with the largest number of death sentences still assign only one lawyer to defend a capital case.
>
> In contrast to the prosecution's virtually unlimited access to experts and investigative assistance, the lawyer defending the indigent accused in a capital case may not have any investigative or expert assistance to prepare for trial and present a defense.[16]

Because of the deficiencies in capital defense representation, the risk of wrongful conviction in death penalty cases is real. While some of the mistakes of capital trials undoubtedly have been discovered on appeal or during postconviction proceedings, there is no way of knowing whether innocent persons have been executed or whether innocent persons are currently on death row.

What we do know is that an unusually large number of capital defendants have been released from death row because of their innocence. As reported by the Subcommittee on Civil and Constitutional Rights of the U.S. House of Representatives Committee on the Judiciary:

> At least 52 people have been released from prison after serving time on death row since 1973 with significant evidence of their innocence. In 47 of these cases, the defendant was subsequently acquitted, pardoned, or charges were dropped. In three of the cases, a compromise was reached and the defendants were immediately released upon pleading to a lesser offense. In the remaining two cases, one defendant was released when the parole board became convinced of his innocence, and the other was acquitted at a retrial of the capital charge but convicted of lesser related charges.[17]

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16. *Id.* at 1840, 1843-44, 1846.

17. STAFF OF HOUSE SUBCOMM. ON CIVIL AND CONSTITUTIONAL RIGHTS, COMMITTEE ON THE JUDICIARY, 103D CONG., 2D SESS., INNOCENCE AND THE DEATH PENALTY: ASSESSING THE DANGER

It is also known that an exceptionally large number of prisoners sentenced to death in state courts have been successful in habeas corpus challenges to their convictions in the federal courts. Between July 1976 and May 1991, 186 of 407 capital convictions were reversed on constitutional grounds, which is a forty-six percent rate of reversal. The error rate in noncapital cases is less than five percent.[18]

II. INDIANA CRIMINAL RULE 24 AND RULES IN OTHER STATES

The Indiana Supreme Court adopted Criminal Rule 24 in its current form, effective February 1, 1993. The Rule addresses the most important problems of capital defense representation discussed in the preceding section, including the qualifications and compensation of counsel, the number of counsel to be appointed, and the availability of investigative, expert, and other services necessary for an adequate defense.[19] However, the Rule might never have been approved by the Indiana Supreme Court—and almost certainly not in its current form—but for the establishment by statute in 1989 of the Indiana Public Defender Commission.[20]

Pursuant to the statute, the Commission is authorized to reimburse Indiana counties fifty percent of their costs for defense services in death cases if there is compliance with the Commission's "guidelines" pertaining to defense representation in such cases.[21] The Commission is also directed to make recommendations to the Supreme Court concerning standards for defense services in capital cases.[22] In order to reimburse Indiana counties for defense expenditures in death penalty cases (as well as non-capital cases), the Commission receives annually from the state, by statute, the sum of $650,000.[23] Until the creation of the Commission and its reimbursement funding scheme, Indiana counties were solely responsible for all costs incident to death penalty prosecutions.

After almost one year of meetings and study, in November 1990, the Commission submitted a proposed criminal rule to the Indiana Supreme Court for

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OF MISTAKEN EXECUTIONS 3 (Comm. Print 1994).

18. Memorandum from James S. Liebman, Vice Dean and Professor of Law, Columbia University School of Law, to Representative Jack Brooks, Chairman, Committee on the Judiciary, U.S. House of Representatives 16 (October 10, 1991). Since 1988, the primary coordinators of indigent death penalty representation were federally funded Post-Conviction Defender Organizations (PCDOs). Congress defunded the PCDOs in 1995, chiefly due to the perception that they were used as "vehicles for delaying the judicial process"; many are attempting to continue operations as private non-profit organizations. *See Month by Month: The Year That Was*, NAT'L L.J., Jan. 1, 1996, at C2, C3; Marcia Coyle, *Death Resource Centers Reborn as Private Groups*, NAT'L L.J., Jan. 15, 1996, at A9.

19. IND. R. CRIM. P. 24(B)-(C).

20. IND. CODE §§ 33-9-13-1 to -4; §§ 33-9-14-1 to -6 (1993).

21. *Id.* §§ 33-9-14-4, -5.

22. *Id.* § 33-9-13-3(a)(1).

23. *Id.* § 33-19-7-5(c).

appointing and compensating defense counsel in capital cases.[24] In its submission to the Supreme Court the Commission explained:

> [that it was] authorized to set guidelines under which counties are eligible for state reimbursement of 50% of the county's certified expenditures for defense services provided in capital cases. . . . If the Court adopts the proposed rule, the Commission will make compliance with the rule a guideline that must be met in order for a county to be eligible for reimbursement from the public defense fund . . . .[25]

In other words, although the Commission could have adopted its own set of guidelines as a precondition for county reimbursement of defense costs in capital cases, it decided that it was preferable to make compliance with a Supreme Court rule the basis for determining county eligibility for reimbursement.

Indiana Criminal Rule 24 ("Rule 24") is based substantially upon the rule proposed by the Commission. While there are differences between the Commission's proposed rule and the rule adopted by the Indiana Supreme Court, the Commission's study of the issue and submission to the Court provides an excellent example of how lawyers with expertise in a specific area can assist a state supreme court in its rule-making function. Except as otherwise indicated, the significant features of the rule, recommended by the Commission, were as follows:

> (1) The rule requires that two "qualified" attorneys be appointed in all death penalty proceedings.[26]
>
> (2) The rule establishes qualifications for lead and co-counsel. Lead counsel must "be an experienced and active trial practitioner with at least five (5) years of criminal litigation experience."[27] Also, lead counsel must have had prior experience as lead or co-counsel in at least five felony jury trials which were tried to completion[28] and have had prior experience in at least one case in which the death penalty was sought.[29] (The Commission had recommended that lead trial counsel have had at least nine prior felony jury trials.[30])

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24. Indiana Public Defender Comm'n, Proposed Criminal Rule 25: Appointment and Compensation of Counsel in Capital Cases (November 1990) (unpublished document, on file with author) [hereinafter Proposed Criminal Rule]. The Commission's proposed rule was sent only to the Indiana Supreme Court and not released for public comment or discussion. The Commission suggested that the Court promulgate a new rule, to be called Criminal Rule 25. The Court decided, however, to rewrite then existing Criminal Rule 24 and to incorporate the Commission's recommendations and other provisions.

25. *Id.* at 1-2.

26. IND. R. CRIM. P. 24(B).

27. *Id.* 24(B)(1)(a).

28. *Id.* 24(B)(1)(b).

29. *Id.* 24(B)(1)(c).

30. Proposed Criminal Rule, *supra* note 24, at 13.

(3) Co-counsel must "be an experienced and active trial practitioner with at least three (3) years of criminal litigation experience."[31] In addition, co-counsel must have had experience as lead or co-counsel in at least three felony jury trials that were tried to completion.[32] (The Commission had recommended that two of the prior felony jury trials have been trials in which the charge was murder or a class A felony under Indiana law.[33])

(4) Additionally, no lawyer is qualified to serve as lead or co-counsel unless they "have completed within two (2) years prior to appointment at least twelve (12) hours of training in the defense of capital cases in a course approved by the Indiana Public Defender Commission."[34]

(5) The rule addresses the workload of counsel by informing judges that in making appointments they are to consider "the nature and volume of [counsel's] . . . workload . . . to assure that counsel can direct sufficient attention to the defense of a capital case."[35] In addition, the rule directs judges "not [to] make an appointment of counsel . . . without assessing the impact of the appointment on the attorney's workload."[36] Further, the rule instructs lawyers that their goal must be to "provide each client with quality representation in accordance with constitutional and professional standards,"[37] and that excessive workloads that would interfere with "quality representation or lead to a breach of professional obligations" must be avoided.[38]

(6) In order to implement the foregoing workload objectives, the rule directs judges not to appoint "salaried or contractual public defenders" to capital cases if their caseload will exceed 20 open felony cases while the death penalty case is pending in the trial court.[39] Also, no new cases may be assigned to a public defender within thirty days of the trial date for a capital case[40] (the Commission recommended sixty days [41]) and none of the cases of a public defender may be set for trial within fifteen days of a capital trial[42] (the Commission recommended sixty days[43]).

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31. IND. R. CRIM. P. 24(B)(2)(a).
32. *Id.* 24(B)(2)(b).
33. Proposed Criminal Rule, *supra* note 24, at 14.
34. IND. R. CRIM. P. 24(B)(1)(d), 24(B)(2)(c).
35. *Id.* 24(B)(3).
36. *Id.* 24(B)(3)(b).
37. *Id.* 24(B)(3)(a).
38. *Id.*
39. *Id.* 24(B)(3)(c)(i).
40. *Id.* 24(B)(3)(c)(ii).
41. Proposed Criminal Rule, *supra* note 24, at 26.
42. IND. R. CRIM. P. 24(B)(3)(c)(iii).
43. Proposed Criminal Rule, *supra* note 24, at 26.

(7) The Commission recommended that attorneys appointed to a capital case be compensated at $75 an hour.[44] The rule adopted by the Supreme Court reduced the hourly rate of compensation to $70 an hour and added that payment to the attorneys should be made "upon determination by the trial judge that such time and services are reasonable and necessary for the defense of the defendant."[45] Also, in an approach not recommended by the Commission, the rule provides that if "the appointing judge determines that the rate of compensation is not representative of practice in the community, the appointing judge may request the Executive Director of the Division of State Court Administration to authorize payment of a different hourly rate of compensation in a specific case."[46]

(8) Finally, in language adopted verbatim from the Commission's recommendation,[47] the rule provides that "[c]ounsel appointed in a capital case shall be provided with adequate funds for investigative, expert, and other services necessary to prepare and present an adequate defense at every stage of the proceeding, including the sentencing phase."[48]

There was only one major Commission recommendation that the Supreme Court did not adopt. The Commission recommended that it be granted authority to create and maintain rosters of qualified attorneys eligible for appointments in capital cases and that judges be authorized to appoint only attorneys whose names appeared on the Commission's rosters.[49] Further, the Commission proposed that it be authorized to remove an attorney from one of its rosters, after written notice and an opportunity for the attorney to be heard, if there was "compelling evidence that an attorney has inexcusably ignored basic responsibilities."[50]

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44. *Id.* at 32.

45. IND. R. CRIM. P. 24(C)(1).

46. *Id.* The Commission's records reflect only one case in which this provision of Rule 24 has been invoked. In State v. Stevens, No. 67S00-9308-DP-844 (Tippecanoe County, 1995 term), the trial court asked the attorneys to accept $65 as their hourly fee and the attorneys agreed to do so. There was no finding, however, "that the rate of compensation [$70] [was] not representative of practice in the community . . . ." IND. R. CRIM. P. 24(C)(1). In fact, it would be exceedingly difficult to find that $70 per hour is too high a rate for the defense of a death penalty case because hourly rates of lawyers are invariably more than $70 per hour. Moreover, retained cases for the defense of a death case in Indiana (as in states everywhere) are virtually non-existent, and if an attorney were to be retained in such a case the fee charged undoubtedly would be much more than $70 per hour. *See infra* notes 92-101 and accompanying text. Accordingly, pursuant to the Rule, it could be argued that the $70 per hour compensation should be increased in all death penalty cases because the rate is "not representative of practice in the community . . . ." IND. R. CRIM. P. 24(C)(1).

47. Proposed Criminal Rule, *supra* note 24, at 30.

48. IND. R. CRIM. P. 24 (C)(2).

49. Proposed Criminal Rule, *supra* note 24, at 9-10.

50. *Id.* at 21.

Rule 24 is similar to the first such rule in the country on capital defense representation—Rule 65, adopted in 1987 by the Ohio Supreme Court.[51] Like the Indiana rule, Rule 65 establishes experiential requirements for appointment of counsel[52] including a specialized training requirement.[53] Furthermore, the Ohio Public Defender Commission (the statewide defense agency) may deny reimbursement to counties for defense fees and expenses if an attorney appointed to a capital case is ineligible for assignment under Rule 65.[54] The Ohio rule also contains a provision on "support services" that is similar to the Indiana rule.[55] However, the Ohio rule does not address the issue of compensation for appointed lawyers; rather, the payments for defense lawyers in Ohio death penalty cases are set by each county and vary throughout the state.[56] Moreover, as discussed later, the rule does not appear to have had the same impact in Ohio as Rule 24 has had in Indiana.[57]

Some efforts at reform concerning the appointment of counsel in death penalty cases are underway in other states as well. For example, the Public Defender Commission in Virginia adopted experiential standards for the assignment of counsel in capital cases in that state, effective July 1, 1992.[58] In 1993, the Oklahoma Indigent Defense System Board adopted, on an interim basis, the *American Bar Association's Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*.[59] In July 1994, the Louisiana Supreme Court created the Louisiana Indigent Defender Board, which will be responsible for preparing qualification standards for the appointment of counsel in death penalty cases and for drawing up recommended rates of compensation for appointed counsel in such cases.[60] Finally, in August 1994, the Tennessee Supreme Court issued an order creating the Indigent Defense Commission, which will be responsible for preparing standards for capital cases, including rates of compensation.[61]

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51. OHIO C.P. SUP. R. 65.

52. *Id.* 65(II)(A)(2)-(3).

53. *Id.* 65(II)(A)(2)(c), 65(II)(A)(3)(c).

54. OHIO ADMIN. CODE § 120-1-13 (1995).

55. OHIO C.P. SUP. R. 65(IV)(D).

56. *See infra* notes 128-133 and accompanying text.

57. *See infra* Part V for a discussion of the "Comparisons Between Ohio and Indiana."

58. VA. CODE ANN. § 19.2-163.7 (Michie Supp. 1994) (describing the appointment of counsel when an indigent defendant is charged with a capital offense); *see also id.* § 19.2-163.8 (noting criteria to be considered by the Public Defender Commission and the Virginia State Bar when adopting standards for appointment of counsel in capital cases).

59. *See supra* note 1 and accompanying text. *See also* Questionnaire, *supra* note 2.

60. LA. REV. STAT. ANN. § 15:144 (West Supp. 1995).

61. *In re* The Indigent Criminal Justice System, 883 S.W.2d 133 (Tenn. 1994). In addition to creating the Indigent Defense Commission, the Supreme Court of Tennessee set forth guidelines for the Commission in developing a plan for the delivery of legal services to indigent defendants in criminal cases.

III. IMPACT OF RULE 24

The overriding goal of Rule 24 was to assure that defendants in capital cases would receive "quality representation in accordance with constitutional and professional standards," as stated in the Rule.[62] Although it is impossible to assess whether that has actually occurred, there is evidence that the Rule has made a difference in the performance of defense counsel and that it has influenced prosecutors in deciding whether to seek the death penalty.

Tables one and two below show requests for the death penalty and the dispositions of cases in Indiana from January 1, 1990 through December 31, 1994:[63]

TABLE ONE

DEATH PENALTY REQUESTS

	1990	1991	1992	1993	1994
Number of Persons for Whom Death Penalty was Requested	24	22	11	9	15
Number of Different Cases	17	17	9	9	13
Number of Different Counties	11	14	6	6	9
Number of Different Cases in Marion County in which Death Penalty was Requested	3	4	2	4	2
Number of Different Cases in Lake County in which Death Penalty was Requested	4	1	2	1	1

62. IND. R. CRIM. P. 24(B)(3)(a).

63. The data for these tables were assembled through a joint effort by the author and Paula Sites, a staff member of the Indiana Public Defender Council, who assists defense lawyers assigned to represent defendants in capital cases. At least as far back as January 1990, Ms. Sites has maintained information on all death penalty cases in Indiana, keeping track of the counties in which the cases were filed, the lawyers assigned to the cases, and case outcomes. Except for the information compiled by Ms. Sites, there does not appear to be a statewide database pertaining to death penalty cases. IND. R. CRIM. P. 24(A) requires prosecuting attorneys to notify the Court Administrator of the Indiana Supreme Court when a death penalty case is filed. There is no requirement, however, that case outcomes be reported to the Court Administrator. The Indiana Public Defender Council, which employs Ms. Sites, provides backup services for attorneys who represent indigent defendants in all types of criminal cases. The Council is an agency of Indiana state government. *See* IND. CODE § 33-9-12-1 (1993 & Supp. 1995).

As this Article was being finalized, the author and Ms. Sites tabulated the number of death penalty requests filed by prosecutors during 1995. From January 1 through August 15, 1995, Indiana prosecutors sought the death penalty for nine persons, representing seven different cases and four different counties. One of the seven cases was from Marion County and one was from Lake County. While these data for 1995 are incomplete, they suggest that 1995 will be similar to the period from 1992 to 1994 regarding the number of Indiana death penalty requests; thus, once again, the number of such requests will likely be fewer than in 1990 and 1991, i.e., prior to the adoption of Rule 24.

TABLE TWO

DISPOSITIONS OF DEATH PENALTY CASES
BASED ON YEAR OF DEATH PENALTY REQUEST

	1990	1991	1992	1993	1994
Guilty/Death Sentence Imposed by Jury	1	4	--	--	--
Guilty/Jury Recommended Against Death Penalty/Death Imposed by Judge	--	1	1	--	--
Hung Jury on Death/Death Imposed by Judge	2	--	1	--	--
Guilty/Jury Recommended Death/Death Not Imposed by Judge	--	2	--	--	--
Guilty/Jury Recommended Against Death	2	1	3	1	--
Death Request Dismissed Pursuant to Plea Arrangement/Defendant Pled Guilty/Term of Years Imposed	12	11	4	1	2
Death Request Dismissed but not in return for Request of Plea of Guilty /Defendant Pled or Went to Trial	3	4	2	2	--
Plea of Guilty/No Plea Arrangement/Death Imposed by Court	--	--	--	1	--
Plea of Guilty/No Plea Arrangement/Death not Imposed	1	--	--	--	--
Death Request Dismissed/ Pending Trial	--	--	--	--	--
Death Request Pending/Case Pending Trial	--	--	--	3	12
All Charges Dismissed	1	1	--	1	1
Acquittal	2	1	--	--	--
Total	24	25	11	9	15

Rule 24 became effective January 1, 1992, and was made applicable to all subsequent cases in which a death penalty request was filed by an Indiana prosecutor.[64] Accordingly, it is possible to compare the above death-penalty data for the two years prior to the Rule's effective date with the three years after the Rule went into effect. Table One reveals that during 1990 and 1991 Indiana prosecutors requested the death penalty against forty-six persons in thirty-four different cases, whereas during 1992 and 1993 the prosecutors sought the death

64. *See supra* note 3 for the effective date of IND. R. CRIM. P. 24 and its amendments.

penalty against only twenty persons in eighteen different cases. If the data from 1994 are added to the data for 1992 and 1993, the number of persons against whom the death penalty was sought jumps to thirty-five, involving a total of thirty-one different cases.

Table Two shows, as of March 1995, the outcomes of Indiana death penalty prosecutions during the five years of 1990 through 1994. Perhaps most noteworthy is that for three consecutive years, 1992 through 1994, there was not a single death penalty case governed by the requirements of Rule 24 (i.e., cases in which the death penalty was filed after January 1, 1992) in which a jury returned a death penalty verdict;[65] however, there were five such verdicts involving cases in which the death penalty was requested during 1990 and 1991. Of the post-1992 death penalty cases concluded during 1992 through 1994, there were three in which the death penalty was imposed, but in each instance the trial court rendered the verdict. In one case, the jury recommended against death but the court imposed it;[66] in a second case, the jury hung on the question of the death penalty, and the court imposed it.[67] In the third case the defendant waived a jury trial on the penalty issue, pled guilty, and the court imposed a death sentence.[68]

To what extent can it be said that the reduction in the number of death penalty filings revealed in Table One, and the outcome differences revealed in Table Two, are attributable to Rule 24? Admittedly, the relatively small number of Indiana death penalty cases detracts from the reliability of any suggestion that Rule 24, independent of other variables, is responsible for differences in the number of death penalty filings and outcomes.[69] On the other hand, as discussed below, the

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65. The record of "no Indiana death penalty verdicts" could not reasonably have been expected to last forever. Just as this Article was being completed in 1995, there were three death cases, all of which were filed after January 1, 1992, in which juries recommended the death penalty. *See* State v. Stevens, No. 67S00-9308-DP-844 (Tippecanoe County, 1995 term) (defendant sentenced on March 14, 1995); State v. Wrinkles, No. 82C01-9407-CF-447 (Vanderburg County, 1995 term) (defendant sentenced on June 14, 1995); State v. Timberlake, No. 49G02-9302-CF-01491 (Marion County, 1995 term) (defendant sentenced on August 11, 1995).

66. State v. Saylor, No. 48S00-DP-6 (Madison County, 1994 term). The death penalty request was filed June 15, 1992; Saylor was sentenced to death February 17, 1994.

67. State v. Williams, No. 45G02-9207-CF-00182 (Lake County, 1994 term). The death penalty request was filed Sept. 25, 1992; Williams was sentenced to death March 2, 1993.

68. State v. Prowell, No. 82C01-9305-CF-313 (Vanderburg County, 1994 term). The death penalty request was filed July 7, 1993; Prowell was sentenced to death May 5, 1994.

69. "It is widely recognized . . . that small samples provide a less reliable basis for making an inference about the true behavior of a decision process than do larger samples of decisions." DAVID C. BALDUS & JAMES W. L. COLE, STATISTICAL PROOF OF DISCRIMINATION § 9.12, at 177 (Supp. 1987). *See also* International Bd. of Teamsters v. United States, 431 U.S. 324, 340 n.20 (1977) ("Considerations such as small sample size may, of course, detract from the value of such evidence. . . ."). If outcomes in Indiana death penalty cases do not markedly change during the next several years and the number of death penalty filings remain about the same as they were during 1992-1994, greater statistical reliability can be attached to the data from the first several years of experience with Rule 24. *See, e.g.*, BALDUS & COLE, *supra*, § 9.221, at 309 (1980) ("Test statistics

statements of prosecutors and defense lawyers interviewed for this Article strongly suggest that Rule 24 has had an impact on prosecution requests for the death penalty and on case outcomes.

Moreover, during 1992 to 1993, while the number of death penalty prosecutions in Indiana declined, the number of murders and non-negligent manslaughters increased:[70]

TABLE THREE

MURDERS AND NON-NEGLIGENT MANSLAUGHTERS IN INDIANA

	Murders and Non-Neg. Manslaughters	Rate per 100,000 Population
1989	353	6.3
1990	344	6.2
1991	423	7.5
1992	464	8.2

In view of these data, an increase in the number of death penalty requests during 1992 might have been expected; yet just the opposite occurred. Admittedly, these data are not entirely compelling because they combine both murders and non-negligent manslaughters, and do not deal at all with the seriousness of the murders committed.

To better understand the impact of Rule 24, I conducted six lengthy interviews with prosecutors, defense lawyers, and one person quite familiar with criminal prosecutions in Indiana. All of the interviewees had practiced in either one or both of the state's two largest counties, and were selected based upon the recommendations of persons knowledgeable about Indiana death penalty prosecutions. All of the interviewees (with one exception) have had extensive experience in either prosecuting or defending death penalty cases. Two of the persons interviewed were prosecutors who have not served as defense lawyers. Two are currently defense lawyers and former prosecutors who have handled death

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are also positively related to sample size. All other things being equal, the test statistic and level of significance rise as the sample size increases.").

70. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1990, at 357 [hereinafter SOURCEBOOK—1990]; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1991, at 376; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1992, at 361; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1993, at 356.

penalty cases as both prosecutors and defense lawyers. One of the persons was a defense lawyer who has not served as a prosecutor. In order to encourage interviewees to be completely candid in their responses to questions, all were promised that their names would not be disclosed. The interviews took place between January and August 1994, and each lasted approximately one to one and one-half hours. At the end of each interview (with the exception of one that was tape recorded), I promptly dictated my notes, which were then typed.

Originally, I had planned to conduct additional interviews, but the remarkable similarity of interviewee responses about Rule 24 indicated to me that additional interviews were unlikely to be productive. As outlined in the following summary of their comments, all of the persons interviewed believed that the Rule had a major impact on the prosecution and defense of death penalty cases.[71]

The interviewees agreed that Rule 24 had led to improved representation by defense lawyers in capital cases. As one of the prosecutors put it, defense lawyers are doing a "better job now" than before the Rule, especially because they are much more likely to retain experts for the mitigation stage of the death penalty prosecution. This same prosecutor also said that the work of defense lawyers has "likely" led to more careful and thorough preparation by prosecutors. He noted that a death penalty verdict returned now would be more likely to be sustained on appeal, as the appellate court would be less apt to find that defense counsel was ineffective.

The defense lawyers were much more emphatic in describing the impact of Rule 24 on the quality of defense services. As one defense lawyer put it, the Rule has "made a helluva difference" because the defense can now "put together a defense team" consisting of two lawyers, investigators, and experts. Further, he said that two defense attorneys were not always appointed to defend death penalty prosecutions prior to Rule 24. Another defense attorney, experienced in both capital trials and death penalty postconviction and appellate litigation, characterized the situation as "drastically different now" compared to before the Rule. This lawyer recalled one capital case that he handled at the postconviction stage in which the trial attorney had no prior felony defense experience, let alone in capital trials, and the attorney had never received any specific training in the defense of death penalty cases. The trial attorney was appointed because he had tried three or four felony jury cases as a deputy prosecutor.

This same lawyer also pointed to the mitigation stage of a death penalty prosecution, noting that defense attorneys in the past did little or no preparation for the mitigation hearing but now concentrate on the area. He attributed the change to the training that defense lawyers now are required to receive, which has raised their "consciousness" about the role that experts can play in the defense of death cases, and to the fact that trial judges will now appoint experts for the defense. Another defense lawyer explained that prior to the adoption of Rule 24, defense attorneys "didn't ask for much in the way of experts and investigators, and

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71. In reporting the comments of persons interviewed, material placed in quotation marks are the actual words spoken by the interviewees. Where quotation marks are not used, comments are summarized in words similar to those used by interviewees.

they couldn't get them if they did ask." Further, trial courts did not appoint "mitigation specialists" for the defense and "if you sought approval from the court for much beyond a psychiatric evaluation, you were not going to get it." Yet another defense lawyer cited the retention of experts as invaluable, recalling that in one of his cases the information dug up about the defendant by a psychologist and toxicologist, which was turned over to the prosecutor, convinced the prosecutor to dismiss the death penalty request. Both prosecutors and defense attorneys agreed that trial judges usually granted defense requests for experts, and that this was due both to the language of Rule 24[72] and to Indiana case law.[73]

The fees paid pursuant to Rule 24—$70 per hour for each lawyer—were also deemed to be very important by the defense attorneys in persuading lawyers to accept death penalty cases and to work diligently on them. As one of the defense lawyers explained, "there are now defense attorneys willing to take death cases whereas they would not have done so a few years ago." Further, he said that attorneys are "willing to work hard on the cases because they know they will be paid." Another defense attorney called the rate of $70 per hour "reasonable for government work." He especially thought it was important that there was no cap on the amount of fees paid to defense counsel because this meant lawyers could devote themselves to a death penalty case without worrying about whether they were putting in too many hours. Moreover, trial courts almost never reduce the fee claims of defense counsel, perhaps, as one defense lawyer speculated, because the "judges don't want to have any problems with the Commission" when it comes to the reimbursement of the county for defense costs.

On the other hand, prosecutors were unenthusiastic about the fees paid to defense counsel in capital cases. One of the prosecutors said he "wished prosecutors were paid the same as defense lawyers." The other prosecutor who was interviewed said that he did not quarrel with defense attorneys being paid $70 per hour, but he believed that there should be a ceiling on the amount of their compensation, perhaps with an escape clause, so that judges could occasionally authorize more than the maximum compensation. In the absence of a cap on fees, this prosecutor believed that "defense lawyers run us around."

As noted earlier, the data clearly indicate that fewer death penalty requests

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72. *See supra* text accompanying notes 47-48.

73.

> We are persuaded . . . that the trial court did abuse its discretion in denying Castor's application for a defense psychologist to assist him in defending himself during the penalty phase of the trial. . . . One of the statutory mitigators which both the jury and the trial judge must weigh during the penalty phase of the trial is whether the defendant "was under the influence of extreme mental or emotional disturbance when he committed the murder." In view of the showing made . . . it was incumbent upon the trial court to allow Castor appropriate resources to develop the opinion of this expert witness concerning this statutory mitigator. The failure of the trial court to approve the expenditure of the funds necessary to further develop this opinion was erroneous and requires reversal of the death penalty.

Castor v. State, 587 N.E.2d 1281, 1288 (Ind. 1992) (citation omitted).

have been filed by Indiana prosecutors since Rule 24 became effective on January 1, 1992.[74] At the time of my interviews, however, these data had not yet been published and none of the persons whom I interviewed could, therefore, be certain that fewer death penalty requests had been filed statewide. Nevertheless, all of my interviewees were convinced that death penalty requests in Indiana had declined, although they conceded that they had never seen any actual statistics to this effect. While I did not reveal in my interviews what the data showed, I inquired of everyone why they thought prosecutors were now filing fewer death penalty requests. Everyone agreed that it was because of Rule 24.

As one prosecutor explained, Rule 24 has "put some economic judgment" into the decision-making about whether to seek the death penalty. Another prosecutor put it more bluntly, stating that Rule 24 has "definitely put a damper on asking for the death penalty" because the cases cost the counties more than they used to and the prosecutor must, therefore, "think two or three times" before filing a death penalty request. In addition to the cost consideration, this prosecutor claimed that there were two other effects of Rule 24 that had contributed to a decline in death penalty filings. He noted that defense lawyers now devote much more time to the cases and have more resources (e.g., expert witnesses) at their disposal; this, in turn, puts pressure on a prosecutor's office to devote more of its scarce resources to death penalty cases, thereby making the cases more costly from a personnel standpoint and hence less attractive to prosecute. This prosecutor also conceded that because of Rule 24 it is now more difficult to obtain death penalty verdicts and that it is not "good politics" for prosecutors to lose death penalty cases. According to this prosecutor, one of his fellow prosecutors had told him that he does not intend ever to ask for the death penalty because the cases are just too costly and difficult to prosecute.

The defense lawyers offered exactly the same reasons in explaining why they believed prosecutors were seeking the death penalty less frequently. For example, one of the defense lawyers who had substantial prior experience as a prosecutor in death penalty cases, told me that "prosecutors have gotten much more careful in filing for the death penalty" because the cases are now more costly for the counties and take more of the prosecutor's staff time and resources.

This former prosecutor also discussed political considerations involved in the prosecution of criminal cases. In his opinion, prosecutors do not really want "a system that is fair and equal," they want a system in which they can win. Ours is "an adversarial system and winning is quite important to the prosecutor." As for the death penalty, a prosecutor does not want to risk losing because that generates negative publicity and is seen as "a knock on the prosecutor." Furthermore, when a prosecutor is unsuccessful in obtaining the death penalty in one case, it discourages the prosecutor from seeking the death penalty in other cases. Because Rule 24 has enabled the defense to "level the playing field" in death penalty prosecutions, it's understandable if prosecutors seek the penalty less often.

Finally, this former prosecutor, now defense lawyer, explained that the ability and qualifications of defense counsel are important considerations for the

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74. *See supra* Table One immediately following note 63.

prosecutor in deciding whether to seek the death penalty. He doubted that many prosecutors would admit that the capabilities of defense counsel were important, but he insisted that they are quite significant. If the defendant is represented by "super lawyer" who is going to keep the prosecutor "hopping," the prosecutor will be less likely to ask for the death penalty. Conversely, if the defender is a "weak lawyer," the prosecutor will be more inclined to proceed with a death penalty request.

One of the prosecutors summed up his feelings about Rule 24 by observing that it had enabled defense lawyers "to accomplish indirectly what they could not accomplish directly," by which he meant either elimination of the death penalty or at least a significant reduction in the number of cases in which it is sought. At the same time, this prosecutor conceded that he would still sometimes seek the death penalty if it was an especially "bad case."

Undoubtedly one of the most significant indirect consequences of Rule 24 was the successful effort of Indiana prosecutors to persuade the Indiana legislature to amend the state's life without parole statute. Effective July 1, 1994, Indiana's death penalty statute was amended so that now "[t]he state may seek either a death sentence or a sentence of life imprisonment without parole for murder by alleging . . . at least one (1) of the aggravating circumstances listed in subsection (b)."[75] Because Rule 24 applies only if the state asks for the death penalty, a request solely for life without parole does not trigger any of the requirements of Rule 24; thus, for example, there is no requirement in a life without parole prosecution that the defendant be furnished two lawyers, that they have any special prior experience, or that the lawyers be compensated at $70 per hour. Prosecutors acknowledged that they purposely lobbied for the life without parole option, separate and apart from the death penalty, in order to get around Rule 24.

IV. THE COST OF RULE 24

As noted previously, the Indiana Public Defender Commission is authorized by statute to establish guidelines for reimbursing counties fifty percent of their costs for defense services in capital cases.[76] Since its establishment in 1990, the Commission has twice issued guidelines governing reimbursements to counties. The Commission's first guidelines were effective September 1, 1990, and provided that counties were eligible for fifty percent reimbursement of expenditures for defense services in capital cases, as follows: (1) for attorney services provided after September 1, 1990, provided two attorneys were appointed and each was compensated at a rate of $75 per hour; and (2) for non-attorney defense expenses incurred after July 1, 1989.[77]

The Commission's second set of guidelines superseded those issued in 1990 and were effective January 1, 1992, the date that Rule 24 went into effect. Essentially, pursuant to these guidelines counties were eligible for fifty percent

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75. IND. CODE § 35-50-2-9 (Supp. 1995).

76. *See supra* text accompanying note 21.

77. *See* INDIANA PUBLIC DEFENDER COMMISSION ANNUAL REPORT app. A (1989-1990).

reimbursement for defense services in capital cases, provided the services were rendered in compliance with Rule 24.[78] From a fiscal standpoint, the only significant difference between the Commission's two sets of guidelines related to the hourly compensation rate for attorneys. The Commission originally had required that counties compensate counsel $75 per hour, whereas Rule 24 provides that counsel be paid $70 per hour for their services.[79]

Prior to 1990, each Indiana county paid for all of its defense expenses in death penalty cases and no statewide expense data on the cost of such cases were collected.[80] Thus, there is no statewide data available on the cost of defense services in death cases in Indiana before 1990, although it is generally conceded that defense counsel were not paid as much as $70 per hour and expert and other defense expenses were often not approved by the courts and thus were not paid by the counties.[81] Since 1990, however, because of the Commission's statewide duty to reimburse counties for fifty percent of their defense expenditures in death cases, the Commission has assembled specific cost data on most Indiana capital cases.

Through December 31, 1994, the Commission processed county claims for defense expenditure reimbursements in sixty death penalty cases that fell within its guidelines. The table below depicts the cost of these sixty cases, broken down by expense category, and shows the average defense cost of a death penalty case in Indiana.[82]

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78. *See* INDIANA PUBLIC DEFENDER COMMISSION ANNUAL REPORT app. A (1991-1992).

79. *See supra* text accompanying notes 44-45.

80. Interview with Larry A. Landis, Director of the Indiana Public Defender Council, in Indianapolis, Ind. (March 20, 1995). The Council is a state agency that provides backup support services to defense counsel in indigent criminal cases in Indiana. Mr. Landis has served as director of the Council since 1980. *See also supra* note 63.

81. Interview with Larry A. Landis, Director of the Indiana Public Defender Council, in Indianapolis, Ind. (March 20, 1995). Further, Mr. Landis reports that prior to establishment of the Indiana Public Defender Commission and Rule 24, defense counsel in Indiana death penalty cases were typically paid $40 per hour for their out-of-court time and $50 per hour for in-court time. Part-time public defenders assigned to death penalty cases received no additional compensation.

82. The data contained in Tables Four, Five, and Six have not previously been reported by the Indiana Public Defender Commission. The data reported here were compiled by placing detailed financial information from all sixty of the Commission's cases into a computerized data base.

TABLE FOUR

DEFENSE SERVICE EXPENSES IN CAPITAL CASES (1990-1994)

	Amount	Average Cost Per Case
Attorney Fees	$2,163,227	$36,053
Experts	233,129	3,885
Investigators	213,526	3,559
Paralegals/Law Clerks	56,625	944
Transcripts/Depositions	93,827	1,564
Other Expenses	57,731	962
Total: Non Attorney Expenses	654,838	10,914
Total Expenditures	$2,818,065	$46,967

The average amount of attorneys' fees paid to counsel shown in the above table—$36,053—and the average cost of defense services per case—$46,967—is almost surely somewhat less than the actual costs today of defense services in Indiana capital cases. This is because seven of the sixty cases did not include costs for attorneys' fees since the death penalty request was filed prior to September 1, 1990; and, additionally, fifteen of the sixty cases were still pending as of December 31, 1994, which means that not all of the defense costs for these cases had been reported. Further, counsel in forty-five of the sixty cases were appointed prior to the effective date of Rule 24 and may not have been as diligent in representing their clients as the lawyers appointed after the Rule took effect.

A more accurate reflection of the defense costs of Indiana death penalty cases is probably derived from examining the cost data of the twelve completed death penalty cases filed by prosecutors after Rule 24 went into effect and in which all claims for reimbursement of defense costs had been filed with the Commission as of December 31, 1994. The data for these cases is reflected in Table Five:

TABLE FIVE

DEFENSE SERVICE EXPENSES IN TWELVE COMPLETED CAPITAL CASES

	Amount	Average Cost Per Case
Attorney Fees	$610,869	$50,905
Experts	55,101	4,591
Investigators	56,324	4,693
Paralegal/Law Clerks	10,154	846
Transcripts/Depositions	30,974	2,581
Other Expenses	7,462	621
Total: Non Attorney Expenses	160,017	13,334
Total Expenditures	$770,887	$64,240

The 60 cases summarized in Table Four show an average expenditure for defense services of $46,967, whereas the cost of the twelve closed cases shown in Table Five averaged $64,240, or $17,273 more. The difference is attributable mostly to payments for attorneys' fees. For both groups of cases the average cost of non-attorney expenses was similar ($10,914 for the sixty cases and $13,334 for the twelve closed cases), whereas the cost of attorneys' fees averaged $36,053 for all sixty cases and $50,905 for the twelve completed capital cases.

The cost of death penalty defense representation is further illuminated by examining the cost of the twelve completed cases based upon whether the cases resulted in a jury trial or were resolved in some other fashion. Of the twelve cases, five were tried to juries. Although none of the juries recommended the death penalty, in the one case that resulted in a hung jury the judge imposed the death penalty.[83] Table Six shows the cost of death penalty cases that proceeded to jury trial compared to those that did not:

83. State v. Williams, No. 45G02-9207-CF-00182 (Lake County, 1993 term) (defendant sentenced on March 2, 1993).

TABLE SIX

COST OF TWELVE COMPLETED CASES BASED ON WHETHER JURY TRIAL HELD

	Amount	Average Cost
5 Jury Trial Cases		
Attorney Fees	$367,993	$73,598
Other expenses	80,485	16,097
Total Expenditures	$448,478	$89,695
7 Non-Jury Trial Cases		
Attorney Fees	$242,864	$34,694
Other Expenses	79,524	11,360
Total Expenditures	$322,388	$46,055

As might be expected, the defense costs of the five cases that went to trial were considerably more than the seven cases that did not. The average cost of attorneys' fees for the jury trial cases was $73,598 compared to $34,694 for the cases that were disposed of without a jury trial (an average difference of almost $39,000). Average expenditures for the jury trial cases were $89,695 compared to $46,055 for the non-jury cases (an average difference of $43,640).

From Tables Four, Five, and Six, an analysis can be made of the number of hours that two attorneys appointed to death penalty prosecutions in Indiana typically spend on the cases during the pretrial and trial stages. Table Four, which shows an average attorney fee cost of $36,053 in the sixty cases from 1990 through 1994, means that the average number of hours devoted to these cases was 515 (i.e., $36,053 divided by the hourly rate of $70 = 515 hours or 257.5 hours per each attorney). Table Five, which shows an average attorney fee cost of $50,905 in twelve completed cases, means that the average number of hours devoted to these cases was 727 (i.e., $50,905 divided by the hourly rate of $70 = 727 hours or 363.5 hours per each attorney). Table Six, which shows an average attorney fee cost of $73,598 in the five cases that resulted in jury trials, means that the average number of hours devoted to these cases was 1,051 (i.e., $73,598 divided by the hourly rate of $70 = 1,051 hours or 525 hours per each attorney).

The number of hours devoted by attorneys to the defense of death penalty cases at trial in Indiana appears to be comparable to the number of hours that attorneys in other jurisdictions have found to be necessary. The Spangenberg Group, which has performed numerous investigations nationwide in the area of indigent defense, including studies of capital defense representation, has reported that "the amount of attorney hours spent on . . . [death penalty] cases at the trial

phase . . . [ranges] from 100 to well over 1,500—with most falling into the 300-500 hour range."[84] Further, the Spangenberg Group noted that the Maryland Public Defender estimated that "staff attorney hours spent on death penalty cases at the trial level range between 100 and 1,250 (median 600 hours; average 535 hours)."[85] A 1987 study of the Kansas Legislative Research Department, also reported by the Spangenberg Group, estimated that defense attorneys normally must spend 800-1,000 hours on the trial phase of death penalty cases.[86]

In financial terms, Indiana likely spends more for defense representation in capital cases than is spent in many states.[87] However, as discussed earlier, numerous articles and studies have documented that the compensation paid to defense counsel in death penalty cases is often woefully inadequate,[88] so that payments to counsel elsewhere ought not to be the standard. Although the several prosecutors interviewed for this Article complained that defense counsel were being paid too much, the inescapable conclusion is that defense counsel in Indiana capital cases are not being overpaid and that, if anything, the rate of compensation ought to be increased.

More than twenty-five years ago the President's Crime Commission recommended that in indigent criminal cases defense counsel should be paid "a fee comparable to that which an average lawyer would receive from a paying client for performing similar services."[89] The *American Bar Association Standards for Criminal Justice* recommend that assigned counsel be reimbursed "at a reasonable hourly rate . . . for all hours necessary to provide quality legal representation."[90]

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84. THE SPANGENBERG GROUP, STUDY OF REPRESENTATION IN CAPITAL CASES IN VIRGINIA 22 (1988).

85. *Id.* at 23.

86. *Id.*

87. It is difficult to learn the exact amount spent on defense representation in each of the states that has capital punishment. Often the data are not maintained on a statewide basis or reports are not prepared detailing the expenditures. In states where all of the expenditures for indigent defense are borne by the county, it is especially difficult to obtain cost information. To illustrate the problem, consider Oklahoma, in which indigent defense representation in capital cases is the responsibility of the Indigent Defense System, a state agency created by statute in 1992. OKLA. STAT. tit. 22, §§ 1355-69 (1994). The statute provides that compensation for non-system attorneys in capital cases shall not exceed $20,000 and that no more than $5,000 of this sum may be paid to non-system co-counsel. However, the statutory maximum fee may be exceeded if the Executive Director of the agency, with the approval of the agency's board, determines that the case "was an exceptional one which required an extraordinary amount of time . . . ." *Id.* § 1355.13. The Executive Director, Robert D. Ganstine, advised the author in a phone conversation on November 2, 1994, that the statutory maximum fee was often exceeded with his and the board's approval, but specific financial data was said to be unavailable. Similarly, until the publication of this Article, financial information for Indiana on defense costs in death penalty cases was not available.

88. *See supra* text accompanying notes 5-8.

89. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 61 (1967).

90. AMERICAN BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE

The commentary to this black-letter standard explains why counsel in indigent criminal cases should be adequately compensated:

> First, it is simply unfair to ask those lawyers who happen to have the skill in trial practice and familiarity with criminal law and procedure to donate time to defense representation. It is worth remembering that the judge, prosecutor, and other officials in the criminal courtroom are not expected to do work for compensation that is patently inadequate. Lawyers do, of course, have a public service responsibility, but the dimension of the national need and constitutional importance of counsel is so great that it cannot be discharged by unpaid or inadequately compensated attorneys. Indeed, where payments for counsel are deficient, it is exceedingly difficult to attract able lawyers into criminal practice and to enhance the quality of the defense bar. But most important, the quality of the representation often suffers when adequate compensation for counsel is not available.[91]

Although it may be debated whether the fees paid to counsel in Indiana death penalty cases are sufficient to assure that quality legal representation is provided, clearly the fees in Indiana (let alone in other death penalty states) are not "comparable" to the fees paid to "average lawyers" by paying clients, as recommended by the President's Crime Commission. Most attorneys in private practice will not accept serious and protracted criminal or civil cases for the fees paid for representing indigents in criminal cases.

During early 1995, I interviewed private criminal defense attorneys in Indianapolis and confirmed that they would not accept the defense of a death penalty case unless they were assured of fees substantially greater than $70 per hour.[92] One attorney said that the hourly rates for himself and his partner to handle a retained capital case would be between $150-$200 and $175-$225 respectively. The firm also would require a $100,000 retainer fee to be applied against hourly billing charges and $50,000 to be applied against charges for investigators, experts, and other defense expenses. A second attorney said that his firm would require $75,000-$100,000 as a retainer, and that hourly billing rates would be $200 for the senior attorney and between $75-$100 for the junior member of the firm. A third attorney estimated that his fee for a death case (which would include himself and another attorney from his office) would be between $250,000 and $300,000, to be paid at the start of the case. In addition, he would require the client to deposit at least $100,000 into a fund to be used for defense expenses. These attorneys emphasized that these sums were reasonable, in light of the emotional pressures and time demands of a death penalty case, the need to decline

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SERVICES, Standard 5-2.4, at 39 (3rd ed. 1992).

91. *Id.* at 41-42.

92. I adhered to my practice in these interviews of promising the lawyers that I would not reveal their names. I wanted their candid statements about what they would charge for providing representation in retained capital cases. If anonymity was not promised, I was concerned that the lawyers might be tempted to understate their charges in order not to appear unduly expensive.

other legal business while the death penalty case was pending, and the costs of office overhead.

Indeed, the overhead cost involved in operating a modern law office is exceedingly high. A 1987 study reported that the annual average operating expense per attorney, in law firms with one to fifty lawyers, was $65,000, comprising $46,000 for support staff, $16,000 for occupancy expense, and $3,000 for technology.[93] Thus, it is not surprising that the average hourly rates charged by most lawyers in private practice almost always exceed $70 per hour.

In a 1995 Tennessee case, a trial court found that "[t]he average hourly cost of office overhead for the attorneys surveyed is $46.81 for the TBA [Tennessee Bar Association] respondents and $47.26 for the TACDL [Tennessee Association of Criminal Defense Lawyers] respondents."[94] The court also concluded that "the level of compensation affects the quality of representation."[95] Similarly, a recently completed study of the Massachusetts Bar Advocate Program, conducted by the National Legal Aid and Defender Association, found that "there is a direct relationship between the inadequate compensation of Bar Advocates [i.e., lawyers who provide public defense] and the low quality of representation received by many indigent defendents." When surveyed through a mail questionnaire, thirty-six percent of 344 Bar Advocate respondents conceded that in approximately twenty percent of their cases they did not perform some otherwise appropriate defense activities due to insufficient compensation. These findings are consistent with research in other job areas that has sought to measure the impact of compensation on job performance.[96]

A 1993 *National Law Journal* study of law firms with more than 70 attorneys reported hourly rates as high as $500 per hour for partners and $280 for associates.[97] The three Indianapolis law firms listed in this survey reported the following billing ranges:[98]

Baker & Daniels

Partners	$155 - $250
Associates	$ 90 - $150

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93. James F. Robenborst & S.S. Samuelson, *Expanding? Consider Overhead*, NAT'L L.J., July 10, 1989, at 15, 16.

94. Tennessee v. Matthews, slip op. at 1 (Crim. Ct. Montgomery County Tenn. Order of March 28, 1995). In this case, the court ordered that the defense attorney in the pending capital case be paid $100 per hour for time spent both in court and out of court.

95. *Id.* at 3.

96. *See, e.g.*, EDWARD E. LAWLER III, PAY AND ORGANIZATIONAL EFFECTIVENESS 124 (1971) (discussing the relationship between job performance and compensation).

97. Kenneth Rutman, *Hourly Rates for Partners and Associates*, NAT'L L.J., December 20, 1993, at S6. This article is based on survey data collected from law firms across the country. The firms' principal city locations and the billing rates for partners and associates are given.

98. *Id.*

Ice Miller Donadio & Ryan

Partners	$160 - $240
Associates	$ 90 - $145

Locke Reynolds Boyd & Weisell

Partners	$100 - $225
Associates	$ 85 - $140

In other words, in these three law firms, when human lives are *not* at stake, private clients are charged at least $85 or $90 per hour for the time of the least experienced associates. These associates, of course, are recent law graduates who lack the experience and skill to handle a complex civil or criminal case.

The fees charged by these Indianapolis law firms, moreover, are quite typical of private practice. An article dealing with billing practices among law firms in Illinois reports that in small firms the maximum and minimum hourly billing rates for partners are $350 and $85 per hour.[99] Similarly, a Michigan report indicates that the median hourly billing rate for attorneys in that state is $125. This represents a 19% increase since 1991, when the rate was $105, and a 67% increase since 1984 when the rate was $75.[100] Surely lawyers are not being overcompensated when paid $70 per hour to defend a person on trial for his or her life! Even in federal death penalty prosecutions, defense counsel are routinely paid $125 per hour and sometimes more.[101]

Indiana's hourly compensation rate of $70 is especially modest when compared to the fees typically paid to counsel in civil rights cases in which attorneys' fees are awarded.[102] For example, in a federal civil rights action

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99. Kelly Fox, *Who's the Largest of Them All*, ILL. LEGAL TIMES, July 1994, at 1.

100. Traci R. Gentilozzi, *Results of 1994 Law Practice Economics Survey Released*, MICH. L. WKLY., Sept. 26, 1994, at 3.

101. Pursuant to 21 U.S.C. § 848 (8) (1994), the federal judiciary recommends that attorney compensation in federal capital prosecutions be between $75 and $125 per hour for in-court and out-of-court time. *See* 7 GUIDELINES TO JUDICIARY POLICIES AND PROCEDURE § 6.02 A (2d ed. 1991). In addition, according to Kevin McNally, who has served as Federal Death Penalty Resource Counsel, "the prevailing rate for counsel appointed in federal capital cases . . . is at least $125.00 per hour." Affidavit of Kevin McNally, United States v. Vest, No. 94-00037-01-04/07-17-19-23/25-CR-W-3 (W.D. Mo. 1994). Mr. McNally cites cases from numerous federal jurisdictions in which the rate was fixed at $125 per hour and notes that in a capital case in Detroit the federal district court set an hourly rate of $150. *Id.*

102. *See* 42 U.S.C. § 1988(b) (1994):

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, 1986 of this title, title IX of Public Law 92-318 (20 U.S.C. § 1681 *et seq.*), the Religious Freedom Restoration Act of 1993 (42 U.S.C. § 2000d *et seq.*) or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

involving discrimination in public higher education in Alabama, the lead attorney in the case was awarded his hourly rate of $275 and the other lawyers in the case received awards based upon hourly rates ranging from $100 to $200 per hour.[103] In approving the amount of fees for counsel, the court considered relevant the hourly rates charged by private lawyers in the Northern District of Alabama.[104]

V. COMPARISONS BETWEEN OHIO AND INDIANA

As noted earlier, prosecutors and defense lawyers agree that Rule 24 has made a difference in the handling of Indiana capital cases, and the data suggest that prosecutors are now seeking the death penalty less frequently and that juries are less likely to vote for the death penalty.[105] These findings led me to investigate whether there have been similar developments in Ohio, which was the first state to adopt a rule similar to Indiana's Rule 24. While the inquiry concerning Ohio has been considerably less extensive than the investigation of Indiana, it seems clear that the Ohio rule has not had the same impact in that state. There are some important reasons, however, that probably account for the differences in the two states.

Rule 65 of the Supreme Court of Ohio Rules of Superintendence for Courts of Common Pleas, which became effective October 1, 1987, concerns the defense of death penalty cases.[106] Like Indiana's Rule 24, Ohio Rule 65 establishes experiential requirements for the appointment of lead and co-counsel in death penalty cases. In order to serve as lead counsel, an attorney must have had three years of criminal or civil litigation experience, have been lead counsel in the jury trial of at least one capital case or co-counsel in at least two capital cases, and meet one or more additional requirements.[107] In general, the requirements are similar to those of Indiana's Rule 24, except that Rule 24 requires at least five years of prior criminal litigation experience.[108]

The Indiana and Ohio rules are identical in requiring that attorneys, in order to qualify for appointments as either lead or co-counsel, attend training programs

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103. *See* Knight v. Alabama, 824 F. Supp. 1022, 1031 (N.D. Ala. 1993). *See also* Zampino v. Supermarkets Gen. Corp., No. Civ. A. 90-7234, 1994 WL 470338, at *1-*2 (E.D. Pa. Aug. 31, 1994) (reasonable rates are $150 per hour for an attorney with ten years experience, $100 per hour for attorney with three to five years experience, and $40 per hour for a law clerk); Moore v. Secretary of Health & Human Servs., No. 90-2259V, 1992 U.S. Cl. Ct. LEXIS 181, at *5 n.2 (Apr. 10, 1992) ($150 per hour is reasonable attorneys' fee in dispute involving the National Vaccine Injury Compensation Program); Muchnick v. Secretary of Health & Human Servs., No. 90-703V, 1992 U.S. Cl. Ct. LEXIS 148, at *7 (March 25, 1992) (reasonable hourly rates are $175 per hour for partners, $95 per hour for associates, and $50 per hour for law clerks).

104. *Knight*, 824 F. Supp. at 1040.

105. *See supra* text accompanying notes 63-68.

106. OHIO C.P. SUP. R. 65. *See also* COMMITTEE ON THE APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS IN CAPITAL CASES, REPORT (1990).

107. OHIO C.P. SUP. R. 65(II)(A)(2).

108. *See supra* text accompanying note 27.

in the defense of capital cases. Indiana's Rule 24 requires that attorneys receive 12 hours of training every two years.[109] Rule 65 requires that eligible attorneys "[h]ave specialized training in the defense of persons accused of capital crimes as defined by the Committee."[110] The "Committee" refers to the Ohio Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases (the "Rule 65 Committee"), which oversees the implementation of Rule 65. By regulation, the Committee requires that attorneys receive 12 hours of training every two years.[111]

The Indiana and Ohio rules reflect one other important similarity. In both jurisdictions, counties are reimbursed for defense expenditures upon compliance with applicable rules. In Indiana, following compliance with Rule 24, the Indiana Public Defender Commission reimburses counties 50% of their expenditures for death penalty cases.[112] In Ohio, the Ohio Public Defender Commission reimburses counties for defense expenditures upon compliance with Rule 65.[113] The percentage of reimbursement to counties fluctuates, however, because it depends upon the budget of the Ohio Public Defender Commission. As of October 1994, the Commission was reimbursing Ohio counties thirty-nine percent of their death penalty defense costs.[114]

A 1990 report of the Rule 65 Committee noted that the "response to the introduction of Rule 65 was dramatic,"[115] as hundreds of attorneys sought to become certified to provide representation in death penalty cases. As of July 1, 1990, 854 attorneys were certified under Rule 65.[116] The report also stated that Rule 65 "is widely believed to have improved the general level of representation in capital cases."[117] However, according to the available data, no change has occurred either in the number of Ohio capital indictments or in the number of defendants being sentenced to death since Rule 65 went into effect.

While there does not appear to be reliable data in Ohio on the number of capital indictments after 1990, the information has been compiled for the calendar

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109. *See* IND. R. CRIM. P. 24(B)(1)(d) & 24(B)(2)(c).

110. OHIO C.P. SUP. R. 65(A)(2)(c).

111. *See* addendum to OHIO C.P. SUP. R. 65, *Standards for Retention on Appointed Counsel Lists*. The Ohio rule differs from Indiana's Rule 24 in that the Rule 65 Committee is required to maintain rosters of qualified attorneys; the Committee also has the power to investigate and remove attorneys from rosters who have not received the required training.

112. *See supra* note 21 and accompanying text.

113. *See* OHIO ADMIN. CODE § 120-1-13 (1995).

114. Letter from Gregory L. Ayers, Senior Assistant Public Defender, Office of the Ohio Public Defender, to Norman Lefstein, Dean, Indiana University School of Law—Indianapolis (Oct. 24, 1994) (on file with author).

115. COMMITTEE ON THE APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS IN CAPITAL CASES, *supra* note 106, at 9.

116. *Id.* Of the 854 "qualified" attorneys, 139 were for lead trial counsel and appeal, 237 were for lead trial counsel only, 56 were for trial co-counsel and appeal, 420 were for trial co-counsel, and 2 were for appeal only. *Id.* at app. C.

117. *Id.* at 9.

years 1983 through 1990, as reflected in the following table:[118]

TABLE SEVEN

Year	Number of Capital Indictments
1983	116
1984	133
1985	111
1986	89
1987	126
1988	114
1989	121
1990	113

Because Ohio Rule 65 went into effect on October 1, 1987, and its first full year of operation was 1988,[119] it is possible to compare the number of Ohio capital indictments in the five years before the rule's adoption with the three years immediately following. As revealed in the above table, there were 575 capital indictments in Ohio between 1983-1987, yielding an annual average capital indictment rate of 115. During 1988-1990 (the three years following the adoption of Ohio Rule 65), there were 348 capital indictments, yielding an annual average capital indictment rate of 116.

Similarly, the average number of persons added to death row each year in Ohio before and after the adoption of Rule 65 seems to have changed only slightly. The table below shows the number of persons in Ohio sentenced to death from 1983-1993:[120]

118. DAVID C. STEBBINS & JANE A. CORE, THE OHIO PUBLIC DEFENDER COMMISSION, DEATH PENALTY REPORT 8-9 (1991).

119. COMMITTEE ON THE APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS IN CAPITAL CASES, *supra* note 106, at 1.

120. OHIO PUBLIC DEFENDER COMMISSION, REPORT TO THE HONORABLE GEORGE V. VOINOVICH, THE OHIO SUPREME COURT, AND HONORABLE MEMBERS OF THE GENERAL ASSEMBLY OF 1993, at 15-17 (1993).

TABLE EIGHT

Year	New Death Row Inmates
1983	11
1984	13
1985	18
1986	14
1987	10
1988	14
1989	11
1990	9
1991	13
1992	11
1993	12

Thus, between 1983 and 1987 (the five years preceding the adoption of Ohio Rule 65), 66 persons were sentenced to death in Ohio—an average of 13 persons annually. During 1988-1993 (the six years following the adoption of Ohio Rule 65), 70 persons were sentenced to death in Ohio—an average of 11.7 persons annually.

Because the adoption of Rule 24 seems clearly to have discouraged Indiana prosecutors from seeking the death penalty, and a similar Ohio rule appears not to have had any discernible effect on the number of capital prosecutions, some of the possible explanations for the differences were examined. Two discoveries were that attorneys in Indiana are much better compensated for their efforts in death penalty cases than are lawyers in Ohio[121] and that expert witnesses and mitigation specialists are far more likely to be appointed by Indiana trial courts to assist in the defense of capital cases.[122] Although these differences, discussed below, are quite likely the most significant factors contributing to different outcomes in the two states, it is difficult to be certain without additional investigation.

As noted earlier, Indiana Rule 24 requires that both lawyers in death cases be compensated at $70 per hour, without regard to whether the time was spent in-court or out-of-court,[123] and the average cost of completed death cases is $46,967.[124] In contrast, in Ohio the average cost for the defense of death penalty cases is less than half of what it is in Indiana. In fiscal year 1987, the average payments for the defense of capital cases in Ohio was $9,553.[125] By fiscal year

121. *See infra* notes 123-126 and accompanying text.

122. *See supra* note 73 and accompanying text.

123. *See supra* notes 44-45 and accompanying text and text accompanying note 79.

124. *See supra* Table Four at note 82 and accompanying text.

125. COMMITTEE ON THE APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS IN CAPITAL CASES, *supra* note 106, at 10.

1989, the cost had risen to $13,090 per case,[126] and in fiscal year 1994 it was $17,470 per case.[127]

The relatively low payments in Ohio for the defense of capital cases is ultimately attributable to a lack of adequate funding. The Ohio Public Defender Commission reimburses counties, as noted earlier, for thirty-nine percent of their costs for the defense of capital cases,[128] but its reimbursements are limited to $40,000 for two attorneys.[129] Moreover, reimbursements are based on a maximum of $40 per hour for in-court time and $50 per hour for out-of-court time.[130] While most Ohio counties, therefore, pay attorneys $50 and $40 per hour for in-court and out-of-court time, some pay even less.[131] In addition, contrary to practice in Indiana, vouchers of attorneys in Ohio death penalty cases are sometimes reduced by trial judges.[132] The chart below shows the hourly reimbursement rates adopted by Ohio counties for defense attorneys in capital cases:[133]

In-Court Rates	Out-of-Court Rates
$55—1 county	$50—3 counties
$50—46 counties	$45—1 county
$45—5 counties	$40—50 counties
$40—27 counties	$35—5 counties
$35—3 counties	$30—25 counties
$30—6 counties	$20—4 counties

Although Ohio's Rule 65 Committee believes that the rule has led to improved representation in capital cases, the Committee is quite dissatisfied with the level of compensation provided to counsel. In its 1993 report on capital defense representation in Ohio, the Committee complained "that attorneys are not particularly well-compensated"[134] and that "the fees that are paid to appointed counsel in death penalty cases are still too low to attract all of the best defense

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126. *Id.*

127. Letter from Gregory L. Ayers, Senior Assistant Public Defender, Officer of the Ohio Public Defender, to Norman Lefstein, Dean, Indiana University School of Law—Indianapolis (Oct. 24, 1994) (on file with author).

128. *Id.*

129. Telephone interview with Gregory L. Ayers, Chief Deputy Public Defender, Office of the Ohio Public Defender (Oct. 18, 1994).

130. Letter from Gregory L. Ayers, Chief Deputy Public Defender, Office of the Ohio Public Defender, to the Honorable Nicholas Holmes, Jr., Ross County Court of Common Pleas (Apr. 25, 1994) (on file with author).

131. *Id.*

132. Telephone interview with Gregory L. Ayers, Chief Deputy Public Defender, Office of the Ohio Public Defender (May 25, 1994).

133. Letter from Gregory L. Ayers, Chief Deputy Public Defender, Officer of the Ohio Public Defender, to the Honorable Nicholas Holmes, Jr., Ross County Court of Common Pleas (Apr. 25, 1994) (on file with author).

134. COMMITTEE ON THE APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS IN CAPITAL CASES, SECOND REPORT 11 (1993).

attorneys from around the state."[135] Further, the Committee noted that "[o]ften the fees are so low that attorneys cannot afford to provide representation and therefore do not become certified under Rule 65." [136]

The 1993 report of the Rule 65 Committee also complained that the "[t]he amount of funding for expert witnesses and investigation also varies from county to county and case to case."[137] In addition, defense attorneys claimed that requests for the appointment of expert witnesses and mitigation specialists were sometimes denied by trial judges,[138] which contrasts sharply with the statements of defense attorneys in Indiana capital cases.[139] Moreover, Ohio case law regarding the duty of the trial court to appoint experts for the defense was described as "not good,"[140] a proposition that seems well supported because there does not appear to be a decision of the Ohio Supreme Court reversing a capital conviction because of a trial court's refusal to appoint a requested defense expert witness or mitigation specialist.[141]

VI. INDIANA'S DATA, PROSECUTORIAL DISCRETION, AND THE CONSTITUTIONALITY OF THE DEATH PENALTY

If, as suggested in this Article, the quality of defense representation in Indiana has improved due to Rule 24 and prosecutors have become more selective in seeking the death penalty, there should be fewer concerns than ever about the state's scheme for capital punishment. If other states follow the lead of Indiana and improve their systems for providing counsel in capital cases, will they not also dispel concerns about their state's death penalty statute? Regrettably, the answer is no. Improved defense representation will reduce the risk of conviction of persons genuinely innocent and of persons who, though guilty of the offense, deserve to be spared the death penalty because of mitigating circumstances. Improved defense services, however, will not remove the inherent arbitrariness of capital punishment, and objections to the death penalty on constitutional grounds will continue.[142]

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135. *Id.* at 13.

136. *Id.*

137. *Id.*

138. Telephone interview with Gregory L. Ayers, Chief Deputy Public Defender, Office of the Ohio Public Defender (Oct. 18, 1994).

139. *See supra* note 73 and accompanying text.

140. Telephone interview with Gregory L. Ayers, Chief Deputy Public Defender, Office of the Ohio Public Defender (May 25, 1994).

141. A review of Ohio cases does not reveal any decisions of the Ohio Supreme Court in which a capital conviction was reversed because a trial court refused to appoint an expert witness or mitigation specialist requested by the defense. For cases in which the trial court's refusal to appoint an expert for the penalty stage was held not to be reversible error, see State v. Powell, 552 N.E.2d 191 (Ohio 1990) and State v. Esparaza, 529 N.E.2d 192 (Ohio 1988).

142. One form of arbitrariness in capital prosecutions relates to the system for providing legal representation to the accused. Where, in a given state or in comparisons from state to state, there

Opponents of the death penalty have long argued that it should be held unconstitutional because prosecutors have unlimited and unreviewable discretion to select the persons exposed to its sanction.[143] Because the Supreme Court has made it clear that the death penalty cannot constitutionally be imposed in an arbitrary and capricious manner, the contention is that even if statutes guide the jury in its discretion, the prosecutor's unbridled discretion should render the death penalty a violation of the Eighth Amendment.[144] The data from Indiana discussed in this Article lend support to the position of death penalty opponents.

The argument against the death penalty, based upon the broad discretion of prosecutors, was addressed by Justice White in 1976 in his plurality opinion in *Gregg v. Georgia*:[145]

> Petitioner simply asserts that since prosecutors have the power not to charge capital felonies they will exercise that power in a standardless fashion. This is untenable. Absent facts to the contrary it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts. . . . [T]he standards by which they decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence. Thus defendants will escape the death penalty through prosecutorial charging decisions only because the offense is not sufficiently serious; or because the proof is insufficiently strong. . . . If the cases really were "similar" in relevant respects it is unlikely that prosecutors would fail to prosecute them as capital cases; and I am unwilling to assume the contrary.[146]

The concerns dealt with in Justice White's opinion in *Gregg* also were discussed by Justice Brennan in a dissenting opinion in *DeGarmo v. Texas*,[147] decided in 1985. In *DeGarmo*, one of two co-defendants was convicted of capital murder and sentenced to death whereas the other co-defendant, who was equally subject to prosecution for capital murder, received a sentence of 10 years deferred probation. Justice Brennan observed that this "gross disparity in treatment" was

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are significant differences in the qualifications, experience, training, support services, and compensation for the attorneys who provide representation for accused persons charged with capital murder, decisions about who should be executed will turn as much on counsel's performance as on the appropriateness of the death penalty for a particular person.

143. There are countless cases throughout the country in which defense lawyers have contended that the death penalty should be declared unconstitutional because of the prosecutor's unlimited and unreviewable discretion. *See, e.g.*, Jurek v. Texas, 428 U.S. 262, 274 (1976); Resnover v. State, 460 N.E.2d 922, 929 (Ind. 1984). *See also* BARRY NAKELL & KENNETH A. HARDY, THE ARBITRARINESS OF THE DEATH PENALTY 151-61 (1987).

144. *See* Gregg v. Georgia, 428 U.S. 153, 225 (1976) (White, J., concurring).

145. *Id.*

146. *Id.*

147. 474 U.S. 973 (1985) (Brennan, J., dissenting).

"solely the product of the prosecutor's unfettered discretion to choose who will be put in jeopardy of life and who will not."[148] Further, Justice Brennan explained that *Gregg* and its companion cases were intended to eliminate "the arbitrary infliction of death,"[149] but that this had not occurred:

> The selection process for the imposition of the death penalty does not begin at trial; it begins in the prosecutor's office. His decision whether or not to seek capital punishment is no less important than the jury's. Just like the jury, then, where death is the consequence, the prosecutor's "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."
>
> Instead, the decisions whether to prosecute, what offense to prosecute, whether to plea bargain or not to negotiate at all are made at the unbridled discretion of individual prosecutors. The prosecutor's choices are subject to no standards, no supervision, no controls whatever.[150]

While Justice White in *Gregg* believed that prosecutors would decide about the death penalty based upon the same kinds of factors that guide juries in their deliberations, Justice Brennan in *DeGarmo* was convinced that standardless prosecutorial discretion opened the door to arbitrary decision making. Clearly, Justice Brennan was correct in expressing concern about a lack of specific standards governing prosecutors in deciding upon persons for whom to seek the death penalty. Capital punishment statutes typically do not contain any standards to guide the prosecutor in making the momentous decision whether to seek the death penalty. Indiana's statute, for example, simply states that "[t]he state *may* seek . . . a death sentence . . . for murder . . . ."[151] Similarly, neither the prosecution standards of the National District Attorneys Association[152] nor the criminal justice standards of the American Bar Association deal with the charging function of prosecutors in capital cases.[153]

Justice White, moreover, was mistaken in believing that prosecutors would make their decisions in capital cases based solely upon the standards that guide juries in deciding whether to impose the death penalty. The data from Indiana

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148. *Id.* at 974.

149. *Id.* at 974-75.

150. *Id.* at 975 (citation omitted).

151. IND. CODE § 35-50-2-9 (Supp. 1994).

152. *See* NATIONAL DISTRICT ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS § 43.1 (2d ed. 1991).

153. *See* AMERICAN BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 3-3.9 (3d ed. 1993). One writer has suggested that "the absence of legislative standards or definitions leaves county prosecutors free to legislate their own death penalty schemes . . . . A legislative delegation of such enormous power, without guiding standards, permits intolerable variances between capital punishment practices from one county to the next." James E. Lobsenz, *Unbridled Prosecutorial Discretion and Standardless Death Penalty Policies: The Unconstitutionality of the Washington Capital Punishment Statutory Scheme*, 7 U. PUGET SOUND L. REV. 299, 353 (1984).

presented in this Article indicate that decisions of prosecutors about whether to seek the death penalty are sometimes influenced by factors that are quite different from any that juries are ever asked to consider.[154] The reduction since 1992 in the number of Indiana death penalty prosecutions seems clearly related to the changes that have occurred in the way capital cases are defended. All of the persons interviewed, as noted before, attributed the reduction of death penalty filings to Rule 24. One former prosecutor, for example, was quite explicit in stating that the quality of defense counsel is an important factor that prosecutors consider in deciding whether to seek the death penalty. In addition, prosecutors referred to the "economic judgment" that Rule 24 introduced into death penalty decision making, the burden on prosecutor staffs caused by improved defense representation, and the risk of adverse publicity resulting from unsuccessful death penalty prosecutions. In fact, one Indiana prosecutor has apparently declared privately that he doesn't plan to ask for the death penalty in any case.

The observation that prosecutors are influenced by defense counsel's ability in dealing with death penalty cases has been noted before. In a Florida study, the experience of defense counsel was cited by respondents as an important consideration in determining the prosecutor's strategy in plea bargaining capital cases.[155] One question in the study asked about the factors that influence prosecutors in taking first degree murder cases to trial, to which a respondent replied, "[f]acts of the case plus how well the attorneys know each other and how closely they worked together. You pay more attention to a good attorney than one you know is a lightweight, when he communicates with you about the case . . . ."[156]

Moreover, the ability of defense counsel is only one of the extra-legal factors that influence prosecutors in deciding whether to seek the death penalty and how to deal with a death case once it has been charged. The Florida study, which included replies from 16 judges, 16 prosecutors, and 38 defense attorneys, identified numerous extra-legal factors as influencing the decisions of prosecutors. These included the prosecutor's orientation toward punishment, the judge's reputation, the prosecutor's caseload, pressure from the police, media coverage, public opinion, and the political and racial climate.[157]

Given the variety of factors that influence a prosecutor's decision about death penalty cases, it is hardly surprising that studies have found disparities in the way capital cases are treated among jurisdictions within a state. Thus, the Florida study found that the region of the state in which the crime occurred made a difference:

> The analysis shows a significantly higher level of first degree murder indictments in the central region of Florida [than in the southern region] . . . when other legally relevant factors have been controlled. Moreover,

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154. *See supra* text following note 74.

155. William J. Bowers, *The Pervasiveness of Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067, 1075-77 (1983).

156. *Id.* at 1075-76.

157. *Id.* at 1076-77.

> the disparity is even greater if we compare this region with the rest of Florida. . . . In other words, the chances of a first degree murder indictment for otherwise comparable cases were significantly greater in the central region than elsewhere in Florida.[158]

Two other studies—one in New Jersey and the other in North Carolina—found similar sorts of disparities in the charging of capital murder.[159] In the New Jersey study, which analyzed 703 cases eligible for capital prosecution, the researchers concluded that "individual prosecutors are engaging in decision-making which varies greatly across counties and results in an overall capital case processing system which is impermissibly arbitrary . . . ."[160] In the North Carolina study, which involved 661 homicides in that state, the researchers found that the differences in the rates of indictment among the state's judicial districts "cannot be explained by the quality of the evidence in the cases."[161]

That the decision whether to seek the death penalty is dependent upon extra-legal factors, sometimes quite different factors from those envisioned by Justice White in *Gregg*, is perhaps best illustrated by events in Texas. In Harris County, Texas (population about 2.8 million),[162] where Houston is located, death penalty cases have been pursued with great zeal for many years. During 1992-1994, 64 death penalty jury cases were tried, whereas during the same three-year period only five such jury cases were tried in Dallas County (population about 1.8 million).[163] From 1984 through 1993, there were 174 death penalty jury trials in Harris County compared to 35 in Dallas County.[164] Of persons on death row in Texas, Harris County is responsible for 108 compared to 31 from Dallas County.[165] According to District Judge Doug Shaver, "[m]any places share the level of violence [in Houston] . . . but only Harris County has had the popular John B. Holmes as its chief prosecutor since 1979."[166]

Thus, even if defense representation in death penalty cases is improved, counsel's ability and the extra-legal factors cited in other studies will continue to influence the decisions of prosecutors in capital cases, resulting in treatment disparities of eligible defendants. However, both the United States Supreme Court

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158. *Id.* at 1074.

159. *See* Leigh B. Bienen et al., *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 RUTGERS L. REV. 27 (1988); NAKELL & HARDY, *supra* note 143.

160. Bienen et al., *supra* note 159, at 327.

161. NAKELL & HARDY, *supra* note 143, at 125-29.

162. *See* THE WORLD ALMANAC & BOOK OF FACTS 433 (1995) (listing the population of Harris County as 2,818,101).

163. *Id.* (listing the population of Dallas County as 1,852,810). *See also* Gordy Taylor, *Death Works Double-Time in the Lone Star State*, NAT'L L.J., Oct. 3, 1994, at A7.

164. John Makeig, *Capital Justice Takes a Lot of County Capital*, HOUS. CHRON., Aug. 15, 1994, at 1A, 8A.

165. *Id.*

166. Taylor, *supra* note 163, at A7.

and the Indiana Supreme Court have dealt, at least by implication, with disparate treatment of capital defendants. In his concurring opinion in *Gregg*, Justice Stewart rejected the argument that the prosecutor's unfettered decision to seek the death penalty and to plea bargain made any constitutional difference.[167] Justice Stewart acknowledged that a prosecutor could choose to "remove a defendant from consideration as a candidate for the death penalty. [However, n]othing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution."[168] Similarly, the Indiana Supreme Court has routinely rejected claims that the death penalty is unconstitutional because of the prosecutor's broad discretionary power, emphasizing that the jury's subsequent consideration of the case prevents the death penalty from being imposed arbitrarily and capriciously.[169]

Perhaps the most compelling reply to these arguments was suggested by Justice Brennan in *DeGarmo*, in which he noted that the jury's decision about the death penalty is insufficient protection for the scheme of capital punishment because "discrimination and arbitrariness [by the prosecutor] at an earlier point in the selection process nullify the value of later controls on the jury."[170] In other words, a state's system of capital prosecutions is fundamentally unfair when some persons eligible for capital murder, due to extra-legal reasons, receive mercy, whereas others eligible for capital murder, due to extra-legal reasons, are denied mercy. The authors of the previously cited North Carolina study have stated the proposition well:

> Arbitrary favoritism of a degree that undermines the standards as they appear on the statute books cheats those denied such favoritism even if they may be equally undeserving of the leniency improperly afforded others. A capital punishment system that provides arbitrary leniency for some defendants by definition is responsible for arbitrary executions of others.[171]

Arbitrary and inconsistent decisions in the charging of criminal cases may be

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167. Gregg v. Georgia, 428 U.S. 153, 199 (1976).

168. *Id.*

169. In Miller v. State, 623 N.E.2d 403 (Ind. 1993), the Indiana Supreme Court explained that

> Indiana has chosen by statute to place the responsibility of criminal prosecution on the elected prosecuting attorney of a given county. Of course, it is the prosecuting attorney's decision to prosecute whether it be for the death penalty or some lesser penalty. His decision does not determine the final outcome. His decision merely places the person on trial. A determination of guilty and the imposition of a penalty lies with the jury and the judge. We repeatedly have held that this type of procedure is not constitutionally impaired.

Id. at 412 (citation omitted). *See also* Fleenor v. State, 514 N.E.2d 80, 90 (Ind. 1987); Spranger v. State, 498 N.E.2d 931, 946 (Ind. 1986); Resnover v. State, 460 N.E.2d 922, 928 (Ind. 1984).

170. DeGarmo v. Texas, 474 U.S. 973, 975 (1985) (Brennan, J., dissenting).

171. NAKELL & HARDY, *supra* note 143, at 161.

an inevitable facet of our criminal justice system, but the stakes are higher in the capital punishment area because, as the Supreme Court has recognized, "death as a punishment is unique in its severity and irrevocability"[172] and "different in kind from any other punishment imposed . . . ."[173] Procedures for separating defendants for prosecution in other areas of the criminal justice system ought not to be deemed tolerable where the penalty is death.

In theory, a solution to arbitrary decision making by the prosecutor in death penalty cases would be a system of judicial review of prosecutorial actions. However, courts are not well positioned or accustomed to reviewing such matters. As the Supreme Court has noted, the decision whether "to prosecute is particularly ill-suited to judicial review."[174] Further, prosecutors undoubtedly are capable of making plausible arguments, based upon the facts of a particular case, about the appropriateness of the death penalty. Accordingly, procedures for reviewing decisions of prosecutors in individual cases will not necessarily assure that the death penalty is administered without "arbitrariness, discrimination, caprice, and mistake."[175]

CONCLUSION

Developments in Indiana during the past several years demonstrate that the quality of defense representation in capital cases can be improved. What is required are rules dealing with the qualifications and workloads of counsel, adequate compensation for defense lawyers, and the availability at government expense of expert witnesses and mitigation specialists to assist the defense. The adoption of Rule 24 by the Indiana Supreme Court[176] shows what can be done if the state's highest court is committed to reform. Similar developments in Ohio[177] and other states[178] suggest that the criminal justice systems in at least several of the nation's death penalty states are beginning to move in the right direction, but overall the pace of improvement is painfully slow and has far to go.

Of all the problems involved in achieving reform, probably none is more difficult than convincing legislators and other government officials that adequate funding should be provided for the defense of capital cases. However, full coverage of defense costs in capital cases is essential, lest the risk of wrongful conviction[179] be enhanced and undue reliance be placed on appeals and postconviction proceedings to correct errors at trial. It also is undoubtedly cost effective if it means that fewer defendants are sentenced to death and lengthy and

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172. Gregg v. Georgia, 428 U.S. 153, 187 (1976) (citing Furman v. Georgia, 408 U.S. 238, 286-91 (1972) (Brennan, J., concurring)).

173. *Id.* at 188.

174. Wayte v. United States, 470 U.S. 598, 607 (1985).

175. Callins v. Collins, 114 S. Ct. 1127, 1129 (1994).

176. *See supra* notes 3, 26-48 and accompanying text.

177. *See supra* notes 51-57 and accompanying text.

178. *See supra* notes 58-61 and accompanying text.

179. *See supra* note 17 and accompanying text.

expensive appellate and postconviction proceedings are avoided.[180]

Improvement in the quality of defense representation, however, may serve to highlight other issues incident to death penalty prosecutions, just as it has done in Indiana. By improving the quality of defense services in Indiana capital cases, some of the factors that influence prosecutors in exercising their unfettered discretion to seek or not to seek the death penalty have become more evident. Both the objective and interview data presented in this Article strongly suggest that in deciding upon the death penalty prosecutors evaluate more than just the aggravating and mitigating factors specified for the jury's consideration.[181] The ability of defense counsel, the cost of the prosecution, and the burden on the prosecutor's staff, are among the extra-legal factors that prosecutors take into account.[182] These findings, in turn, raise significant and enduring questions about the basic fairness of the scheme for capital punishment in Indiana and other states.

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180. There appears to be agreement that the cost to the public of a successful death penalty prosecution is greater than a non-capital prosecution that results in long-term incarceration. *See, e.g.*, PHILLIP J. COOK & DONNA B. SLAWSON, THE COSTS OF PROCESSING MURDER CASES IN NORTH CAROLINA 97 (1993). *See also* Robert Spangenberg & Elizabeth R. Walsh, *Capital Punishment or Life Imprisonment? Some Cost Considerations*, 23 LOY. L.A. L. REV. 45, 48 (1989); Dave Von Drehle, *Bottom Line: Life in Prison One Sixth as Expensive*, MIAMI HERALD, July 10, 1988, at 12A ("the true cost of an execution is closer to $3.2 million" or approximately six times the cost to keep that person in prison for his or her natural life); Jeremy G. Epstein, *Death Penalty Adds to Our Tax Burdens*, NAT'L L.J., Jan. 16, 1995, at A23, A24 (extensive process and costs involved in postconviction appeals involving death sentences).

181. *See supra* text following note 73.

182. *See supra* text following note 73.

A LAW CLERK AND HIS JUSTICE: WHAT WILLIAM REHNQUIST DID NOT LEARN FROM ROBERT JACKSON

LAURA K. RAY*

INTRODUCTION

When William Rehnquist took his seat on the Supreme Court bench in 1972,[1] he became the second member of a highly select fraternity: former law clerks who returned as Justices. According to the mythology of clerkship on the Court, law clerks are gifted young lawyers who spend a year as apprentices to the giants of the law. The mythmakers are usually the clerks themselves, who—often on the occasion of their Justices' retirement or death—reflect warmly on the professional and personal lessons learned and bonds forged during the clerkship year.[2] Rehnquist's Justice was Robert H. Jackson, one of the Court's major twentieth century figures and one of its most complicated personalities, but the clerk in this instance has been notably uninterested in tracing his lines of connection with Jackson. Yet the links between the two have much to say about both judicial performance and the role of the Court.

Chief Justice Rehnquist presently sits with two of the Court's four former

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1. Rehnquist joined the Court on January 7, 1972. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 982 (Kermit L. Hall ed. 1992) [hereinafter OXFORD COMPANION TO THE SUPREME COURT].

2. *See, e.g.*, RICHARD N. GOODWIN, REMEMBERING AMERICA 24-42 (1989) (Justice Frankfurter); J. HARVIE WILKINSON, III, SERVING JUSTICE 62-63, 67-78, 91-92, 121 (Justice Powell); SAMUEL WILLISTON, LIFE AND LAW 91-94 (1940) (Justice Gray); Dean Acheson, *Recollections of Service with the Federal Supreme Court*, 18 ALA. L. REV. 355 (1957) (Justice Brandeis); Bennett Boskey, *Mr. Chief Justice Stone*, 59 HARV. L. REV. 1200 (1946); Victor Brudney & Richard F. Wolfson, *Mr. Justice Rutledge - Law Clerks' Reflections*, 25 IND. L.J. 455 (1950); William Cohen, *Justice Douglas: A Law Clerk's View*, 26 U. CHI. L. REV. 6 (1958); David M. Ebel, *A Tribute to Justice Byron R. White*, 107 HARV. L. REV. 8 (1993); Christopher L. Eisgruber, *John Paul Stevens and the Manners of Judging*, 1992/1993 ANN. SURV. AM. L. xxix; Alfred McCormack, *A Law Clerk's Recollections*, 46 COLUM. L. REV. 710 (1946) (Chief Justice Stone); Daniel J. Meador, *Justice Black and His Law Clerks*, 15 ALA. L. REV. 57 (1962); Martha Minow, *Thurgood Marshall*, 105 HARV. L. REV. 66 (1991); John H. Pickering et al., *Mr. Justice Murphy - A Note of Appreciation*, 48 MICH. L. REV. 742 (1950); Richard A. Posner, *William J. Brennan, Jr.*, 104 HARV. L. REV. 13 (1990); Terrance Sandalow, *Potter Stewart*, 95 HARV. L. REV. 6 (1981); *Chief Justice Vinson and His Law Clerks*, 49 NW. U. L. REV. 26 (1954); Glen M. Darbyshire, *Clerking for Justice Marshall*, A.B.A. J., Sept. 1991, at 48. For a spirited defense of his Justice by a law clerk, see Mark Tushnet, *Thurgood Marshall and the Brethren*, 80 GEO. L.J. 2109 (1992).

clerks: Justice Stevens clerked for Justice Rutledge, and Justice Breyer clerked for Justice Goldberg. The final member of the group, retired Justice White, clerked for Chief Justice Vinson.[3] None of these pairings, however, resonates in quite the way that the Jackson-Rehnquist relationship does. Both Jackson and Rehnquist saw themselves as outsiders when they gained access to the inner sanctum of Washington power. Both earned their Court appointments through loyal service to controversial Presidents, and both became centers of controversy after joining the Court. Both aspired to become Chief Justice, although only Rehnquist succeeded. Both became strong presences in the Court's conservative wing, and both came to care deeply about the Court as an institution, writing for legal and lay audiences about its role in our system of government.

These parallels, while striking, are less significant than the jurisprudential similarities between the two. Both Jackson and Rehnquist became apostles of judicial restraint, preaching a limited role for the Court in resolving the claims of aggrieved litigants; both espoused a vision of federalism that weighed heavily on the side of state prerogatives; both tended to protect the rights of the community against the constitutional claims of disaffected individuals. Finally, both brought to Supreme Court cases poised at the intersection of law and politics the perspective of a lawyer who had built his career in the halls of executive power. It is here, however, that Jackson and Rehnquist part company. While Jackson, when faced with the crucial cases that shape the structure of government and the conscience of the nation, forged a complex legal vision that transcended politics, Rehnquist found a far simpler vision that treated law as easily distinguishable from politics. As law clerk to Jackson while the Court wrestled with two of its monumental cases—*Youngstown Sheet & Tube Co. v. Sawyer*[4] and *Brown v. Board of Education*[5] —Rehnquist already displayed a cast of mind that prevented him from learning one lesson that his Justice was eminently qualified to teach. An examination of the lives, opinions, and nonjudicial writings of both men will reveal the fundamental divergence in their approaches to the law that was first detectable during Rehnquist's clerkship and emerged with greater clarity over the course of his career.

I. TWO LIVES IN THE LAW

A. Robert H. Jackson

Unlike many members of Franklin Roosevelt's New Deal administration, Robert Jackson came to Washington not from an Ivy League education and big

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3. Justice Stevens clerked for Justice Rutledge in 1947-48; Justice Breyer clerked for Justice Goldberg in 1964-65; Justice White clerked for Chief Justice Vinson in 1946-47. Leonard Orland, *John Paul Stevens*, *in* 5 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1691 (Leon Friedman & Fred L. Israel eds., 1995); Leon Friedman, *Stephen G. Breyer*, *in* 5 *id.* at 1876; Leon Friedman, *Byron R. White*, *in* 4 *id.* at 1579.

4. 343 U.S. 579 (1952).

5. 347 U.S. 483 (1954).

city practice, but from an established career in western New York as a refined example of a country lawyer.[6] He was born to a family with deep roots in the area, and until Roosevelt drew him into government Jackson had remained, for practical as well as personal reasons, close to home. Although he did not attend college, he read widely and developed a literary style and eloquence that placed him close to Holmes and Cardozo. Because he could manage only one year at Albany Law School, Jackson's legal education came in large part from apprenticing in his cousin's law office—training far different from that of virtually all his future colleagues on the Court.[7] He built a thriving and diverse practice in Jamestown, New York, where his clients included corporations and individuals and his cases included civil, administrative, and even a few criminal matters on both the trial and appellate levels.[8] Jackson carried with him to the Supreme Court the value of self-reliance learned in his early practice years. He carried with him as well an icon of his independence, a magazine photograph of a man working alone at his desk, a laurel wreath above his head, and the caption, quoted from Kipling: "He travels fastest who travels alone."[9]

Jackson enjoyed his practice and intended his first assignment in Washington as general counsel for the Internal Revenue Bureau to be only a brief interlude. The work of a country lawyer offered him both the comfort of a valued role in a well ordered community and the opportunity to use his substantial legal abilities. Jackson celebrated the country lawyer as one who "understands the structure of society and how its groups interlock and interact, because he lives in a community so small that he can keep it all in view."[10] That perspective also teaches the country lawyer "how disordered and hopelessly unstable [society] would be without law" and that "in this country the administration of justice is based on *law practice*."[11] Beyond such abstract satisfactions, his practice also offered Jackson what was for him the chief pleasure of lawyering, the act of advocacy,[12] because

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6. EUGENE C. GERHART, AMERICA'S ADVOCATE: ROBERT H. JACKSON 46 (1958). Gerhart's biography is uncritical, admiring, and at times adulatory. For an admiring assessment of Jackson's career in practice, see Charles S. Desmond, *The Role of the Country Lawyer in the Organized Bar and the Development of the Law, in* MR. JUSTICE JACKSON: FOUR LECTURES IN HIS HONOR 16-28 (1969) [hereinafter MR. JUSTICE JACKSON].

7. GERHART, *supra* note 6, at 33-34; John L. O'Brian, *Introduction, The Role of the Country Lawyer, in* MR. JUSTICE JACKSON, *supra* note 6, at 8.

8. For a discussion of Jackson's legal career in Jamestown, see GERHART, *supra* note 6, at 35-45.

9. *Id.* at 48. The photograph had belonged to Frank Mott, the cousin in whose law office Jackson had apprenticed. *Id.* at 33. When Jackson began his practice, he shared Mott's offices but remained an independent practitioner. *Id.* at 35.

10. Robert H. Jackson, *Tribute to Country Lawyers: A Review*, A.B.A. J., March 1944, at 138.

11. *Id.*

12. Gerhart reports Jackson's comments in an interview with his biographer: "I like the combat. I always liked the underdog's side, but I had no great emotion about it and no conviction that the underdog is always right, like some people think. . . . I was never a crusader. I just liked

the variety of his cases supplied a technical challenge he relished.[13] In Washington, however, Jackson was compelled to balance advocacy with politics in his work at the Internal Revenue Bureau and subsequently in other posts in the Justice Department with which Roosevelt tempted him to remain with the administration. Jackson performed successfully but left without regret when the President appointed him Solicitor General in 1938.[14]

In the post of Solicitor General he found a job which suited his talents and tastes and which Justice Brandeis appreciatively thought he should hold for life.[15] Jackson described his appointment as Solicitor General as a homecoming:

> Coming back to the practice of law, which I did in the Solicitor General's office, was like coming home after being out in a bad storm. I was delighted with the work. I cut off other types of things as fast as I could and settled down to the legal work of the Department of Justice in the Supreme Court and other appellate courts. I entered upon the most enjoyable period of my whole official life.[16]

As the government's advocate, Jackson had little difficulty in forgoing "the assertion of one's individual eccentricities" and embracing wholeheartedly his

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a good fight!" GERHART, *supra* note 6, at 36.

13. Jackson described the work of the country lawyer as tenacious advocacy:

> Once enlisted for a client, he took his obligation seriously. He insisted on complete control of the litigation—he was no mere hired hand. But he gave every power and resource to the cause. He identified himself with the client's cause fully, sometimes too fully. He would fight the adverse party and fight his counsel, fight every hostile witness, and fight the court, fight public sentiment, fight any obstacle to his client's success. He never quit. . . . The law to him was like a religion, and its practice was more than a means of support; it was a mission.

Jackson, *supra* note 10, at 139.

14. From February 1934 Jackson served for two years as General Counsel of the Bureau of Internal Revenue, then briefly as Assistant Attorney General for the Tax Division, and finally as Assistant Attorney General for the Antitrust Division until his appointment on March 5, 1938 as Solicitor General. Warner W. Gardner, *Government Attorney*, 55 COLUM. L. REV. 438, 440-41 (1955). As counsel to the Bureau of Internal Revenue, he directed the government's civil litigation against Andrew Mellon. Although Jackson had recommended strongly against charging fraud, Roosevelt decided to include the fraud claim to protect the Justice Department, which had failed earlier to secure a criminal fraud indictment against Mellon. *See* Philip B. Kurland, *Robert H. Jackson*, *in* 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1287 (Leon Friedman & Fred L. Israel eds., 1995). As Assistant Attorney General, Jackson worked in support of Roosevelt's court packing plan, giving speeches and testifying before the Senate Judiciary Committee. GERHART, *supra* note 6, at 108-15.

15. Felix Frankfurter, *Mr. Justice Jackson*, 68 HARV. L. REV. 937, 939 (1955). *See also* Kurland, *supra* note 14, at 1299.

16. Kurland, *supra* note 14, at 1296 (quoted from Jackson's taped interviews for the Oral History project of Columbia University).

client's position.[17] Even as a committed advocate Jackson acknowledged his obligation to deal candidly and honorably with the Supreme Court, which traditionally looked to the Solicitor General for an evenhanded assessment of the law.[18] He also, however, approached his government litigation as he had his Jamestown cases, with the practitioner's pragmatic calculation of the votes needed to win.[19] What Jackson seems to have relished in his work as Solicitor General was the chance to serve Roosevelt and at the same time to serve his own conception of the effective advocate. His elevation to Attorney General in 1940 was the natural next step in his progress toward the Supreme Court, but for Jackson it was also a move to a less congenial position. Although as Solicitor General he had continued to advise the President, as Attorney General he was less the government's advocate and more the President's lawyer.[20]

During the eighteen months that Jackson served as Attorney General, Roosevelt looked to him for political assistance as well as legal counsel.[21] Although Jackson had occasionally been mentioned as a presidential nominee for the 1940 election, he accepted Roosevelt's decision to run for a third term with equanimity, even when he was passed over in favor of Henry Wallace as the vice presidential candidate.[22] Jackson attended the 1940 convention and later campaigned actively for Roosevelt.[23] Jackson's flirtation with national political office was brief and, at least according to Harold Ickes, Roosevelt's Secretary of

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17. *Id.* at 1297.

18. *Id.* For an account of the Court's expectations concerning the Solicitor General, see LINCOLN CAPLAN, THE TENTH JUSTICE 19-32 (1988).

19. "As long as I was Solicitor General, I was dealing with a Court on which most of the members were of the old Court and I needed them to make up a majority." Kurland, *supra* note 14, at 1297.

20. Jackson's work for the President during his time as Solicitor General included reviewing the Neutrality Proclamation of 1939 and suggesting the deletion of Canada; Jackson also participated in studies of the implications of war for the American economy. GERHART, *supra* note 6, at 179-82. *See also* Kurland, *supra* note 14, at 1298, 1301.

21. Jackson was appointed Attorney General in January 1940 and served until July 1941. GERHART, *supra* note 6, at 193, 231. According to Kurland, "[t]he change in position accentuated rather than diminished Jackson's ties with the President." Kurland, *supra* note 14, at 1299. Kurland quotes Jackson on his new post:

> I think the Attorney General has a dual position. He is the lawyer for the President. He is also, in a sense, laying down the law for the government as a judge might. I don't think he is quite as free to advocate an untenable position because it happens to be his client's position as he would if he were in private practice. He has a responsibility to others than the President. He is the legal officer of the United States.

Id. at 1299-1300.

22. GERHART, *supra* note 6, at 199, 200-01, 204. Roosevelt had also apparently spoken to Jackson about running for the governorship of New York in 1938, but the state Democratic party, especially its national party leader, Jim Farley, was not receptive. *Id.* at 122-23, 136-38.

23. *Id.* at 205, 206-08.

the Interior, appropriately so.[24] Jackson was more comfortable performing traditional lawyer's tasks. He was instrumental in drafting the lend lease agreement that permitted the President to send obsolete destroyers to Great Britain in exchange for use of British military bases,[25] and he formulated the administration's international law position on just and unjust wars.[26] Jackson's tenure as Attorney General came to an early end in July of 1941, however, when he took the Supreme Court seat vacated by Justice Stone's elevation to Chief Justice.[27]

Roosevelt had long dangled before Jackson the prospect of a place on the Court, particularly Chief Justice, and Jackson keenly wanted the center seat.[28] At the retirement of Chief Justice Hughes, Roosevelt considered Jackson and Stone for the appointment. Although Roosevelt reportedly favored Jackson, he was persuaded by Justice Frankfurter that, with war imminent, the selection of the Republican Stone would create "confidence in you as a national and not a partisan President."[29] Roosevelt's obvious enthusiasm for Jackson gave rise to a rumor that the sixty-eight year old Stone had agreed to step down as Chief Justice at the age of seventy to make way for Jackson. Although the rumor was strongly denied by Stone, who later insisted that had any such deal been proposed "I should have declined the appointment,"[30] it nonetheless contributed to a vague sense that Jackson was entitled to the chief justiceship when it next became vacant. It was thus Jackson's fate that, named to the Supreme Court at the age of forty-nine, he seemed somehow to have already lost his chance for the two most prestigious posts in American government and to be still awaiting the call to a higher destiny.

Jackson's career on the Supreme Court is usually divided into two periods separated by his service as the United States' chief prosecutor at the Nuremberg War Crimes Trials. In the first period, he remained recognizable as the New Dealer who had supported Roosevelt's policies for a decade. After his return from Nuremberg, however, Jackson moved farther to the Court's right, finding his

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24. After observing Jackson at the convention, Ickes assessed Jackson's political potential with a skeptical eye. Jackson was, he thought, "more of a lawyer than an aggressive leader. If he is ever to become President I hope that he will develop a disposition not only to stand for what is right but to fight for it." 3 HAROLD L. ICKES, THE SECRET DIARY OF HAROLD L. ICKES 267 (1955).

25. GERHART, *supra* note 6, at 215-21.

26. *Id.* at 223-27.

27. OXFORD COMPANION TO THE SUPREME COURT, *supra* note 1, at 981.

28. In 1940 Roosevelt appointed Frank Murphy, his attorney general, to the seat created by the death of Justice Pierce Butler. According to Gerhart, Jackson advised Roosevelt that Murphy was ill-suited to the Court because "he was not interested in legal problems . . . nor in the law as a philosophy," but Roosevelt persevered with the appointment, which allowed him to shift Jackson to the post of attorney general. GERHART, *supra* note 6, at 183. *See* HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS 229 (3d ed. 1992).

29. ALPHEUS MASON, HARLAN FISK STONE: PILLAR OF THE LAW 567 (1956). For a discussion of the Stone appointment, see ABRAHAM, *supra* note 28, at 232-34. *See also* GERHART, *supra* note 6, at 230-31.

30. MASON, *supra* note 29, at 573.

principal ally in another former New Deal advocate, Felix Frankfurter, who counseled the Court to exercise judicial restraint.[31] This description is far too simple for a complex figure like Jackson, but it does suggest the significant break between the Jackson who left the Court for the prosecutorial challenge of Nuremberg and the Jackson who returned to a Court led by its new Chief Justice, Fred Vinson. Nuremberg itself, although a powerful and consuming experience, does not wholly explain Jackson's transformation.[32] His disappointment over his failure to secure the chief justiceship, a disappointment which manifested itself in an episode of remarkable bitterness and indiscretion, also contributed to Jackson's sense that his return to the Court would be less than a triumphant coda to his legal career.

Although there are several interpretations of this episode, some more critical of Jackson than others, the outlines are relatively clear.[33] When Chief Justice Stone died suddenly in April 1946, Jackson was still in Nuremberg and Harry S. Truman had succeeded Roosevelt. Two rumors began circulating in Washington: that Jackson was the likely successor and that Justice Black had notified President Truman that he would resign if Jackson were named Chief Justice. Black and Jackson had been at odds before Jackson's departure over Black's decision to sit in *Jewell Ridge Coal Corp. v. Local No. 6107, United Mine Workers of America*,[34] which was argued by his former law partner. Jackson objected and published an opinion obliquely critical of Black's presence.[35] Aware of the tension between Black and Jackson, Truman consulted two former members of the Court before selecting Fred Vinson, then his Secretary of the Treasury, to lead the Court and

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31. *See, e.g.*, GLENDON SCHUBERT, DISPASSIONATE JUSTICE 5-6 (1969). Schubert quotes two other commentators, Alan F. Westin and Max Lerner, who express a similar view of Jackson's career. *Id* at 6. *See also* WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 85-86 (1987).

32. There are varying assessments of Jackson's success at Nuremberg, particularly in his cross-examination of Goering, although his opening and closing statements have been widely admired. For a flattering treatment of his work at Nuremberg, see GERHART, *supra* note 6, at 352-454. For a harsher perspective, see, e.g., TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 335-41 (1992).

33. For an excellent and thorough analysis of the incident, see Dennis J. Hutchinson, *The Black-Jackson Feud*, 1988 SUP. CT. REV. 203. For an account favorable to Jackson, see GERHART, *supra* note 6, at 240-88. According to Hutchinson, much of Gerhart's version is an almost verbatim reprinting of Jackson's own 1949 unpublished memorandum. Hutchinson, *supra* at 224-25. For an account favorable to Black, see JOHN P. FRANK, MR. JUSTICE BLACK 124-31 (1949).

34. 325 U.S. 161 (1945).

35. Jackson's opinion was a concurrence in the Court's denial of a petition for rehearing based in part on Black's participation in the case. Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers, 325 U.S. 897 (1945) (Jackson, J., concurring). Jackson noted that questions of recusal could be resolved only by individual Justices and, in a mild barb, that the Court lacked the power "to exclude one of its duly commissioned Justices from sitting or voting in any case." *Id.* According to Hutchinson, the concurrence "looked innocuous on its face but . . . privately enraged Black." Hutchinson, *supra* note 33, at 208.

restore its harmony.[36] Jackson responded with an angry cable to Truman that attacked Black's conduct in *Jewell Ridge* and asked the President to release the cable in order to dispel the public impression that "'something sinister has been revealed to you which made me unfit for Chief Justice.'"[37] Ignoring Truman's response, which asked him to keep the matter private, Jackson then sent a cable to the House and Senate Judiciary Committees again detailing his charges against Black and followed the cable with a press conference.[38] In airing his grievance, he aired as well the confidential exchanges of the Justices' conference room, an infraction rarely committed by members of the Court.

As is often the case with uncharacteristic behavior, this explosion from the usually controlled Jackson fell wide of its mark. Black, who remained silent throughout the controversy, emerged unscathed, while Jackson's reputation suffered.[39] Any future prospect of becoming Chief Justice now effectively ended, Jackson returned from Nuremberg to resume his judicial duties.[40] In later years Jackson insisted that he had not really wanted to be Chief Justice:

> Of course, it was the easiest thing in the world for them to say, and the most difficult thing in the world to meet—I never attempted to meet it—that I was personally disappointed and bitter about the appointment.

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36. Truman consulted former Chief Justice Hughes and former Associate Justice Owen Roberts, who reportedly advised him not to elevate a member of the Court. C. HERMAN PRITCHETT, THE ROOSEVELT COURT 26 (1948).

37. Hutchinson, *supra* note 33, at 220.

38. *Id.* at 220-21. Even Gerhart concedes that "Jackson may have been imprudent and reckless to issue the statement." GERHART, *supra* note 6, at 267. His account also indicates that "Jackson appears to have consulted no one" before sending his cable. *Id.* at 261.

39. In his account favorable to Justice Black, for whom he clerked, John P. Frank offers these explanations for Jackson's behavior:

> Three answers circulated through the legal profession: first, that Jackson was a virtuous man, revealing an evil situation; second, that Jackson sought to wreak personal vengeance on the man he thought responsible for barring his path to the Chief-Justiceship; and third, that the enormous strain of the Nuremberg trial, a serious failure both in publicity and in results from a prosecutor's standpoint, caused an irrational act for which there is no rational explanation.

FRANK, *supra* note 33, at 131. In a magazine article written shortly after the event, Arthur M. Schlesinger, Jr., characterized Jackson's behavior as

> the act of a weary and sorely beset man, committed to a harassing task in a remote land, tormented by the certainty that the chief justiceship had now passed forever out of his reach. Only someone who has lived the unreal life of an army of occupation can understand the violence of his response to the fragmentary reports of Washington intrigue; he reacted as a G.I. would to rumors of his wife's infidelity.

The Supreme Court: 1947, FORTUNE, Jan. 1947, at 78, *quoted in* PRITCHETT, *supra* note 36, at 28-29.

40. Schubert refers to the sending of the cable as "political suicide." SCHUBERT, *supra* note 31, at 5.

> Unless one knows the inner workings of the court, you can't probably realize that one is really better off as an associate justice of the court in everything except kudos than he is as chief, because the chief has a lot of trivial details to attend to. There was no use in answering that, however.[41]

It seems clear, however, that Jackson reacted out of frustration at seeing the long delayed prize lost by a conjunction of unhappy circumstances—Roosevelt's death a year earlier, Jackson's own absence from Washington in an era of limited trans-Atlantic communication, the internal tensions of the Court, the Washington rumor mill. Bruised by his brush with judicial politics, Jackson retreated to the legal fastness of the Supreme Court bench, where he served for the remaining eight years of his life. His work during that final period suggests that he reflected on the entanglements of the Court and the political world and, when the occasion presented itself, found ways to accommodate the separate strands of law and politics.

B. William H. Rehnquist

The facts of William H. Rehnquist's life are fewer and more conventional than those of Jackson's biography. Rehnquist was born a generation later, in 1924, in Milwaukee, Wisconsin, where he grew up in a comfortable suburb. His education was interrupted by World War II. After briefly attending Kenyon College, he enlisted in the Army Air Corps, serving as a weather observer. When the war ended he resumed his studies under the G.I. Bill at Stanford University, majoring in political science and graduating as a member of Phi Beta Kappa. Rehnquist then took two master's degrees in political science, one from Harvard and one from Stanford, before entering law school at Stanford.[42] In December 1951, he

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41. Hutchinson, *supra* note 33, at 226. (quoting VIII COLUMBIA UNIVERSITY ORAL HISTORY PROJECT 527). Hutchinson observes that

> Jackson seethed over what he saw as behind-the-scenes efforts to keep him from the center chair of the Court. Those remarks not only belie his denial, but they reveal that by 1952 Jackson had come to believe that Douglas more than Black had been responsible within the Court for his defeat.

Id. Gerhart quotes Jackson as saying somewhat ambiguously, in interviews conducted in 1948 and 1951, that "I'm happier as Associate Justice than I could be as Chief Justice. I don't say that I would have refused it. I couldn't remember anything in my mind that I would rather do than be Chief Justice." GERHART, *supra* note 6, at 287.

42. There is some discrepancy in accounts of Rehnquist's education. According to Sue Davis, he received a master's degree in political science from Stanford in 1949 and a master's degree in government from Harvard in 1950. SUE DAVIS, JUSTICE REHNQUIST AND THE CONSTITUTION 5 (1989). The biographical sketch that appears in the Senate Judiciary Committee Report prepared in November 1971 omits the master's degree from Stanford and refers to a master's degree from Harvard in history. SENATE JUDICIARY COMM., NOMINATION OF WILLIAM H. REHNQUIST, S. EXEC. DOC. NO. 16, 92d Cong., 1st Sess. 2 (1971), *reprinted in* 8 THE SUPREME COURT OF THE UNITED STATES: HEARING AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE 1916-75 (Roy

graduated first in his class and became Justice Jackson's law clerk in the middle of the Court's 1951 Term. He stayed for the 1952 Term before beginning a varied private practice, reminiscent of Jackson's, in Phoenix, Arizona.[43] Through his conservative political activities in Phoenix, Rehnquist became acquainted with Richard G. Kleindienst,[44] who became deputy attorney general in the Nixon administration. In 1969 Rehnquist was named assistant attorney general in charge of the Office of Legal Counsel, the office that provides legal advice to the President. It was from that post, in which his duties included screening potential Supreme Court nominees, that Rehnquist was appointed to the Court in 1971 and in January 1972 took the seat that Jackson had once occupied.

Rehnquist's conservative views expressed during his tenure in the executive branch and in his years in Phoenix made his nomination controversial;[45] he was ultimately confirmed by a vote of sixty-eight to twenty-six, which reflected the reservations of many Democratic and a few Republican senators about his nomination.[46] The controversy was renewed in 1986, when President Reagan nominated Rehnquist to replace retiring Chief Justice Burger, with the focus on a memorandum concerning *Brown v. Board of Education*[47] written by Rehnquist as Jackson's law clerk. Again, following a bitter debate, Rehnquist was confirmed, this time by the smallest margin of any Court appointee to that date.[48]

In some respects, the differences between Rehnquist and Jackson reflect the

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M. Mersky & J. Myron Jacobstein eds., 1977) [hereinafter NOMINATIONS OF SUPREME COURT JUSTICES]. See also Chris Henry, *William H. Rehnquist, in* 5 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1666 (Leon Friedman & Fred L. Israel eds., 1995), which refers only to a master's degree from Harvard in political science. The biographical data sheet available from Chief Justice Rehnquist's chambers lists a 1948 master's degree from Stanford and a 1950 master's degree from Harvard.

43. Rehnquist worked with a succession of Phoenix firms. *See* NOMINATIONS OF SUPREME COURT JUSTICES, *supra* note 42, at 2. Rehnquist "joined a small Phoenix law firm and set about pursuing the day-to-day drudgery of wills, estates, real estate closings, and property disputes that are the bread and butter of any small law firm involved in a general practice." Henry, *supra* note 42, at 1668.

44. Rehnquist had opposed the Arizona civil rights bill, a public accommodations ordinance in Phoenix, and integration plans for the Phoenix schools. *See* DONALD E. BOLES, MR. JUSTICE REHNQUIST, JUDICIAL ACTIVIST 75-77 (1987). For copies of his written statements on some of these issues, see NOMINATIONS OF SUPREME COURT JUSTICES, *supra* note 42, at 305-07 (public accommodations ordinance), 309 (de facto segregation in the Phoenix schools).

45. For accounts of Rehnquist's activities in Phoenix and in the Office of Legal Counsel, see DAVIS, *supra* note 42, at 6-7; Henry, *supra* note 42, at 1668-70; *See generally* BOLES, *supra* note 44.

46. ABRAHAM, *supra* note 28, at 321-22. The three Republicans voting against Rehnquist were Senators Clifford P. Case, Jacob K. Javits, and Edward W. Brooke. *Id.*

47. 347 U.S. 483 (1954).

48. Rehnquist was confirmed by a vote of sixty-five to thirty-three; the votes in opposition "constituted the largest number of votes ever cast against a nominee who won confirmation." ABRAHAM, *supra* note 28, at 351.

differences between their generations. Where Jackson was largely self-educated, though among the most erudite of the Court's members, Rehnquist attended some of the country's most distinguished schools. Where Jackson entered practice at the age of 21, Rehnquist was delayed by military service and his clerkship until the age of 29. Notwithstanding their differences, significant similarities exist between Rehnquist and Jackson as well. Both came to the Court not from a lower bench but from the executive branch, where each worked for a President who locked horns with the Court and sought to redirect it through his appointments. More tellingly, each was involved in the judicial selection process, though from rather different perspectives. Jackson was an intimate advisor to Roosevelt and was given to understand early on that a seat on the Court would eventually be forthcoming, while Rehnquist worked on several of Nixon's unsuccessful nominations before he himself was sent with some suddenness to the Court by a President who had difficulty remembering his name.[49]

The most intriguing similarity between the two Justices, however, is their shared sense of themselves as loners within the powerful institutions they served. Jackson characterized himself as "an individualist of the school of Emerson. Self-reliance, self-help and independence of other people I believe to be the basis of character and essential to success."[50] As the photograph he hung in his Supreme Court chambers suggests, Jackson might advise his clients, including the President, but at times of personal crisis he took no advice himself. When he sent the cable denouncing Justice Black and exposing the internal dissensions of the Court, Jackson apparently consulted no one; according to his own version of events, only slightly altered and presented by Gerhart, "[t]hat he was engaged in preparing such a statement was known only to his son and to his secretary."[51] Gerhart explains this mode of proceeding as Jackson's wish not to seek advice he knew he was unlikely to follow, but the decision seems entirely characteristic of Jackson. Despite his years in the Roosevelt inner circle and on the Court, he still took as his model the independent lawyer who follows his own counsel, on this occasion with unfortunate results. Jackson remained a loner on the Court as well, where his elegant opinions and literary style provided an ironic counterpoint to his

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49. In a July 21, 1971 tape of a White House conversation, President Nixon referred to Rehnquist as Renchburg: "You remember that meeting we had when I told that group of clowns we had around there. Renchburg and that group. What's his name?" Nixon's adviser, John Ehrlichman, helpfully supplies "Renchquist," and the President echoes "Yeah, Renchquist." ABRAHAM, *supra* note 28, at 319.

50. GERHART, *supra* note 6, at 62. Felix Frankfurter identified in Jackson "a preference for truculent independence over prudent deference and conformity." Felix Frankfurter, *Foreword*, 55 COLUM. L. REV. 435, 436 (1955).

51. GERHART, *supra* note 6, at 261. For an account of Jackson's independence as Solicitor General, see E. Barrett Prettyman, Jr., *Robert H. Jackson: "Solicitor General for Life,"* 1992 SUP. CT. HIST. SOC'Y Y.B. 75, 77. Prettyman quotes Charles E. Wyzanski, who worked in the Solicitor General's Office: "It may be that a secretary or two moved with him from place to place, but no first-class assistant. He never had a team nor did he ever evoke that kind of team loyalty in spite of the admiration of everybody who played with him had for him as a player." *Id.*

status as, with one brief exception, the only Justice without a university or law degree.[52] He tended to decide cases with a pragmatic eye, looking less to philosophic consistency than to the practical and commonsensical concerns of a practitioner, and thus to be less predictable than many of his colleagues.

Rehnquist, too, came to the Court as an outsider. Recounting his first approach to the Court, as Jackson's law clerk in 1952, Rehnquist immediately describes himself as "surprised to have been chosen."[53] The picture that emerges from his narration is of a young man from the West, neither diffident nor unqualified for his position, but slightly naive and somewhat bemused at finding himself at the Court. Yet even this young Rehnquist quickly showed his independent spirit. In his first encounter with Justice Frankfurter, Rehnquist had what he calls "the temerity to criticize" a recent opinion by Frankfurter and the persistence to meet the Justice's challenge to find case law in support of the law clerk's position.[54] Returning to the Court twenty years later, Rehnquist remained an independent spirit. As an outspoken conservative on a Court still dominated by liberal colleagues, Rehnquist was frequently a solitary dissenter. In 1974 his law clerks, who called him the "lone dissenter," presented him with a Lone Ranger doll that a decade later still occupied a place of pride on his office mantelpiece, the iconic counterpart to Jackson's solitary traveler.[55]

C. The Lives Intersect

Rehnquist served as Jackson's law clerk from February 1952 to June 1953. In his account of their initial interview, Rehnquist expressed surprise that Jackson had merely chatted about his practice experience rather than quizzing the applicant on some legal topic. When they met again at the start of Rehnquist's clerkship, Jackson was both affable and pragmatic, concerned principally with entering his clerk on the government payroll.[56] What is curious about this account is, to use one of Rehnquist's favorite literary allusions, Sherlock Holmes' dog that didn't bark.[57] Rehnquist has written relatively little about his clerkship with

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52. Of the Justices who served with Jackson, only James Byrnes, who spent just one year on the Court before resigning, had neither an undergraduate nor a law degree. Of the other Justices, Justice Black had a law degree from the University of Alabama but no undergraduate degree, and Justice Reed had undergraduate degrees from Kentucky Wesleyan University and Yale University but no law degree. *See* CONGRESSIONAL QUARTERLY'S GUIDE TO THE SUPREME COURT 857-70 (Elder Witt ed., 2d ed. 1990).

53. REHNQUIST, *supra* note 31, at 17.

54. *Id.* at 76-77.

55. John A. Jenkins, *The Partisan*, N.Y. TIMES MAG., Mar. 3, 1985, at 28, 34.

56. At the first interview, Rehnquist was struck by Jackson's "pleasant and easygoing demeanor," though he left certain that he had lost his chance at the clerkship by failing to make a strong impression. REHNQUIST, *supra* note 31, at 20. When they met again in Washington, Rehnquist remarks that Jackson "greeted me with the affability I remembered." *Id.* at 23.

57. *See* Church of Scientology of Cal. v. Internal Revenue Service, 484 U.S. 9, 17-18 (1987); Harrison v. PPG Industries, Inc., 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting). In

Jackson—these two anecdotes are among the few stories about his interactions with the Justice—and what he has written is remarkably detached and cool in tone. The coolness is particularly noticeable in its contrast to Rehnquist's clearly expressed affection for Justice Frankfurter, whom he found engaging and instructive.[58] Unlike most Supreme Court clerks who revisit their past, Rehnquist had nothing to say of what he learned from Jackson about either the law or the art of judging. In a talk he gave at Albany Law School in the Justice Jackson Lecture Program, Rehnquist recalled Jackson's reflection on life in Washington, but only after prompting from his father.[59]

Rehnquist's talk on Jackson's career is an oddly muted tribute for one Supreme Court Justice to pay another. The talk is peppered with disclaimers: that law clerks do not become the friends of their judges, that others knew Jackson far better than he, that Rehnquist and his fellow clerk received only "courtesy opportunities" to contribute to Jackson's celebrated opinion in *Youngstown Sheet & Tube Co.*, and that Jackson's Christmas gift of an inscribed copy of his book, *The Struggle for Judicial Supremacy*, was most likely "a traditional gift to law clerks so long as the copies supplied by the publisher lasted."[60] When Rehnquist identifies the hallmarks of Jackson's career, his choices are not unqualified praise. Although he begins by invoking "Robert Jackson's remarkable similarity to Abraham Lincoln,"[61] that similarity is to Lincoln's "rare ability to profit from experience, to accommodate his views when that experience seemed to require accommodation, and yet to maintain throughout his life a sturdy independence of view."[62] Rehnquist cites Jackson's career as "a living testament to the fact that the legal profession is indeed a career open to the talents."[63] Yet here too, the explanation seems to undermine the initial praise. The particular Jacksonian ability Rehnquist singles out is "doggedness," by which he means a combination of analytic ability and common sense, the legacy of Jackson's years in western

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the Sherlock Holmes story, *Silver Blaze*, the detective deduces from the dog's failure to bark that it was the trainer who attempted to harm a valuable horse. Sir Arthur Conan Doyle, *Silver Blaze*, *in* THE COMPLETE SHERLOCK HOLMES 383, 400 (1953).

58. "I doubt that my fondness for Justice Frankfurter was any different from that of any other law clerk or law student whom he first dazzled and then befriended." REHNQUIST, *supra* note 31, at 78. Even Frankfurter's instructive manner, which at times disturbed his fellow Justices, "made a warm admirer" of Rehnquist. *Id.* at 81.

59. When Rehnquist's parents visited him during his clerkship, Justice Jackson "generously invited the three of us to have lunch with him in his chambers." During that lunch, Jackson observed that "'Washington is a bad city for a public official to live in. It takes everything from you, and gives nothing back.'" William H. Rehnquist, *Robert H. Jackson: A Perspective Twenty-five Years Later*, 44 ALB. L. REV. 533, 535 (1980) [hereinafter *Robert H. Jackson*]. Rehnquist recalled the conversation only when "stimulated by my father's recollection" and conceded that "at this point in my life [I] would have to say that there is more than a little truth to them." *Id.*

60. *Id.* at 533, 536-38, 540.

61. *Id.* at 536.

62. *Id.*

63. *Id.*

New York.[64] Although Rehnquist has some praise for Jackson's intellect and prose,[65] he seems more interested in the blend of character and experience that shaped Jackson's magnum opus, his *Youngstown Sheet & Tube Co.* concurrence.[66]

Youngstown Sheet & Tube Co. was the most important and controversial case decided during Rehnquist's clerkship. Although Rehnquist disclaimed any role in shaping Jackson's concurrence, he also recalled the excitement among the law clerks as the Supreme Court first granted certiorari and then expedited oral argument to determine whether President Truman had the power to seize the nation's steel mills.[67] For a young man who had arrived in Washington only three months earlier, the *Youngstown* case was an extraordinary opportunity to watch from a prime vantage point as the Court resolved a power dispute between the executive and legislative branches of government within a few weeks:

> Never was a case more made to order for a group of Supreme Court law clerks, all of whom fancied themselves whiz kids, than this one which like Minerva seemed to have sprung full-blown from the Washington environment in which we lived and worked. As I recall, in fact, during one lunch hour we even took a formal vote of the clerks on how the case should be decided. The result was an even division between eighteen law clerks, nine voting for the government and nine voting for the steel companies.[68]

Rehnquist himself favored the steel companies because he believed that "the balance of power within the federal establishment had shifted markedly away from Congress and toward the president in the preceding fifteen years, and that this trend was not a healthy one."[69] He was therefore doubly proud, as a law clerk and a partisan, to hear Jackson wryly disassociate himself from a prior opinion, written as Roosevelt's Attorney General, confirming the President's power to seize a manufacturing plant.[70]

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64. *Id.*

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> When I say "ability," I do not mean simply analytical ability, although I think he possessed that in great degree. I do not mean ability to charm an audience or to add zest to an otherwise dull opinion by a pithy phrase, although I think he possessed these characteristics to a degree unmatched by his contemporaries or successors.

Id. Elsewhere, Rehnquist observed that "Robert H. Jackson had one of the finest literary gifts in the history of the Supreme Court." *Who Writes Decisions of the Supreme Court?*, U.S. NEWS & WORLD REPORT, Dec. 13, 1957, at 74 [hereinafter *Who Writes Decisions*].

66. *Robert H. Jackson, supra* note 59, at 539-40.

67. REHNQUIST, *supra* note 31, at 93. Rehnquist and his co-clerk "were shown the opinion in draft form, and as I recall, asked to find citations for some of the propositions it contained, but that was about the extent of our participation." *Id.*

68. *Id.* at 61-62.

69. *Id.* at 63.

70.

> Jackson commented from the bench that he was afraid that a lot of the basis for the

As an observer of the *Youngstown* case, Rehnquist offered his explanations, past and present, for the Court's determination that the President's seizure of the steel plants was invalid. The young Rehnquist looked to the personal histories of the Justices; because all nine had been appointed by either Roosevelt or Truman, and eight of the nine had been politically active Democrats, he presumed that Truman had an edge.[71] The older Rehnquist, a veteran of two years in the executive branch and sixteen years on the Court, looked instead to external factors to explain Truman's defeat: intense press coverage of the dispute, reaction against the government's original theory of unlimited executive power, the nation's coolness toward the Korean engagement, and Truman's own disfavor with the public.[72] Even Justices with significant political backgrounds, he concluded, are affected by the currents of public opinion. It is striking that Rehnquist's theories, both as law clerk and as Justice, favor context over jurisprudence. His own Justice produced a concurrence, discussed below, which has come to be regarded as the Court's most valuable distillation of the sharing of power between executive and legislative branches. Yet the lesson Rehnquist seems to have learned from the way that Jackson and four other Democrats separated politics from law is that Justices are unable to "isolate themselves from the tides of public opinion" in resolving public controversies of great magnitude.[73]

Jackson and Rehnquist faced the same mixture of law and politics from different perspectives in *Brown v. Board of Education*,[74] which began its passage through the Court during Rehnquist's clerkship. In the conference following the December 1953 reargument, Jackson made it clear to his colleagues that he supported an end to segregation but found it difficult to characterize the Court's

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> government's seizure was being laid at his doorstep, and [Solicitor General] Perlman agreed. Jackson then responded: "I claimed everything, of course, like every other Attorney General does. It was a custom that didn't leave the Department of Justice when I did."
>
> Every law clerk likes to see his own boss look "sharp" on the bench, as if the justice's performance somehow reflected credit upon the law clerk. I virtually glowed with satisfaction at Justice Jackson's comment, not only because I thought it was both relevant and witty, but because it seemed to me to suggest that he did not agree with the government's position.

Id. at 90-91.

71. *Id.* at 64.

72. *Id.* at 95-98. Rehnquist even flirts with a theory he calls "'geographic determinism,'" because the three dissenters, Chief Justice Vinson and Justices Reed and Minton, "had all grown up in towns along the Ohio River not more than two hundred miles apart." *Id.* at 92.

73. *Id.* at 98. Rehnquist is careful to note that "[n]o judge worthy of his salt would ever cast his vote in a particular case simply because he thought a majority of the public wanted him to vote that way," but he distinguishes that view from "saying that no judge is ever influenced by the great tides of public opinion that run in a country such as ours. Judges are influenced by them, and I think such influence played an appreciable part in causing the Steel Seizure Case to be decided the way it was." *Id.*

74. 347 U.S. 483 (1954).

role in achieving that result as judicial rather than political. Quoting from conference notes kept by Justices Burton and Frankfurter, Bernard Schwartz has described Jackson's presentation:

> Jackson started his conference presentation by noting, 'Cardozo said the work of this Court is partly statutory construction and partly politics. This is a question of politics.' What he meant by this is shown by the Jackson gloss on the Cardozo statement in a posthumous work: 'Of course [Cardozo] used 'politics' in no sense of partisanship but in the sense of policy-making.'
>
> In this sense, Jackson told the conference, a decision against segregation would be 'a political decision.' The segregation issue was 'a question of politics.' The Justice also said that the decision 'for me personally is not a problem, but it is difficult to make it other than a political decision. . . . Our problem is to make a judicial decision out of a political conclusion'—and to find 'a judicial basis for a congenial political conclusion.' The clear implication was that he would support a properly written decision striking down segregation. 'As a political decision [I] can go along with it.'[75]

Jackson, then, was wrestling with the dilemma of grounding a desegregation decision in law rather than policy or sociology. He was wary of being led by his personal sympathies toward a result that reflected the Justices' proclivities and not a valid statement of the law.

Jackson's struggle is expressed most distinctly in the draft concurrence he prepared but never filed. In Part I of the draft, he invoked his own education in an integrated school "where Negro pupils were very few" as predisposing him to end segregation, but he immediately dissociated the personal from the legal: "Decision of these cases would be simple if our personal opinion that school segregation is morally, economically or politically indefensible made it legally so."[76] Jackson saw segregation as rooted in social custom and in the politics of Reconstruction; its removal would mean "nothing less than a substantial reconstruction of legal institution [sic] and of society."[77] Although he doubted the Court's power to effect such a drastic change by its decision, he believed that nonjudicial forces would eventually accomplish the same result: "within a generation it will be outlawed by decision of this Court because of the forces of mortality and replacement which operate upon it."[78] The issue for Jackson had two distinct components. One was whether the law supported a decision declaring segregated education unconstitutional. The other was whether such a decision fell

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75. Bernard Schwartz, *Chief Justice Rehnquist, Justice Jackson, and the* Brown *Case*, 1988 SUP. CT. REV. 245, 253.

76. Robert Jackson, Unfiled Draft Concurrence in Brown v. Board of Educ. 1 (March 15, 1994) (on file with the Library of Congress, Manuscript Division, Jackson File).

77. *Id.* at 2.

78. *Id.* at 1.

within "the limitations on responsible use of judicial power in a federal system."[79]

Jackson ultimately answered both questions affirmatively, but only after establishing the difficulties attendant on that outcome. In Part II of his draft Jackson examined the legislative history of the Fourteenth Amendment, subsequent congressional legislation, the conduct of the states in reliance on the Constitution, and judicial precedent. He found nothing in "the conventional material of constitutional interpretation" to support the view that maintenance of segregated schools "up to the date of this decision, . . . had violated the Fourteenth Amendment."[80] In Part III he explored the limitations inherent in judicial decisionmaking as a means of eliminating segregation.[81] He pointed out that because courts can resolve only specific cases, they are ill suited to sweeping social transformations that traditionally are the prerogative of the legislative branch. Thus, "[a] Court decision striking down state statutes or constitutional provisions which authorize or require segregation will not produce a social transition, nor is the judiciary the agency to which the people should look for that result."[82] Entrusting the enforcement of a Court decision to the lower courts "does not end but begins the struggle over segregation,"[83] and Jackson declined to impose on local courts the difficult burden of "continued litigation under circumstances which subject district judges to local pressures and provide them with no standards to justify their decisions to their neighbors, whose opinions they must resist."[84] Jackson rejected the argument that the Court must act because Congress had failed to do so: "The premise is not a sound basis for judicial action."[85]

Only in the final section of the draft, captioned "The Limits and Basis of Judicial Action," did Jackson find a role for the Court to play. He refused to decide whether the courts that had earlier upheld segregation "were right or wrong in their times."[86] Instead, he relied on the dramatic changes in the condition of the Negro, together with the effects of racial assimilation and the transformation of education from a privilege for the few to a statutorily enforced right, as the basis for invalidating segregation. "It is," Jackson concluded, "neither novel nor radical doctrine that statutes once held constitutional may become invalid by reason of changing conditions."[87] He remained, however, cautious about the extent of the Court's role in imposing the new order. It should shape "a resonably [sic]

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79. *Id.* at 4. Jackson makes clear that the related issue of whether the Court's decision will reduce or exacerbate racial tensions "is not my responsibility" but he does express concern that a "Pharisaic and self-righteous approach" by the Court's northern majority would as a practical matter "retard acceptance of this decision." *Id.*

80. *Id.* at 10.

81. *Id.* at 11-23.

82. *Id.* at 14.

83. *Id.*

84. *Id.* at 17.

85. *Id.*

86. *Id.* at 19.

87. *Id.* at 22.

considerate decree" that will take into account "the circumstances under which a large part of the country has grown into the existing system."[88] He concluded by calling for reargument on the nature of the appropriate decree.[89]

The draft is muted and even grudging for an opinion endorsing a dramatic change in both constitutional law and human rights. Conspicuously absent are the typical moments of Jacksonian eloquence, the elegantly turned phrase or soaring conclusion. Instead, the crucial passage is written in a workmanlike but restrained manner:

> I am convinced that present-day conditions require us to strike from our books the doctrine of separate-but-equal facilities and to hold invalid provisions of state constitutions or statutes which classify persons for separate treatment in matters of education based solely on possession of colored blood.[90]

It is possible that with further revision the draft might have attained Jackson's usual note of conviction, but in its present form it suggests instead his continuing discomfort with the jurisprudential demands imposed by *Brown*.

Jackson's draft was never circulated to the Court, perhaps because barely two weeks after completing it he was hospitalized following a heart attack.[91] Chief Justice Warren, who visited Jackson and discussed the draft with him, had been working tirelessly to secure a unanimous opinion and may also have dissuaded Jackson from attempting to complete his concurring opinion.[92] Further dissuasion came from E. Barrett Prettyman, Jr., Rehnquist's successor and Jackson's sole clerk in the 1953 Term, who outlined his reservations about the draft in a memo to Jackson.[93] Prettyman objected to the organization of the draft, which spent more than twenty pages detailing Jackson's concerns about the Court's role and only two pages supporting its decision.[94] In a case like *Brown*, Prettyman urged,

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88. *Id.*

89. *Id.* at 23.

90. *Id.* at 22.

91. The last of Jackson's drafts is dated March 15, 1954. An accompanying memo by Elsie Douglas, Justice Jackson's secretary, states that the draft "'was not circulated to members of the Court or used in any way except in conference with C.J. Warren at Doctors Hospital, where Justice Jackson was a patient from March 30 to May 17, 1954.'" Additional notes by Douglas in the Jackson file indicate that "Justice Frankfurter asked to see this memo and it was read to him on June 27, 1956" and that the memo was "loaned to Justice Harlan" on June 18, 1959.

92. Jackson asked Warren to add a sentence to his opinion describing the progress of Negroes since the passage of the Fourteenth Amendment, and Warren agreed. The conversation is described in BERNARD SCHWARTZ, SUPERCHIEF 98 (1983). For accounts of Warren's strenuous efforts to achieve unanimity, see *id.* at 82-106; RICHARD KLUGER, SIMPLE JUSTICE 667-99 (1976). The added sentence reads: "Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world." Brown v. Board of Educ., 347 U.S. 483, 490 (1954).

93. KLUGER, *supra* note 92, at 690.

94. *Id.* at 691.

the Court's attitude "should be one of faith rather than futility," and its opinions should reflect that faith.[95] Whether the cause was Jackson's health, Warren's urging, Prettyman's critique, or some combination thereof, Jackson signed Warren's unanimous opinion for the Court without qualification, even leaving his hospital bed on the day the opinion was delivered from the bench so that the entire Court would be present.[96]

Jackson's performance in the *Brown* saga reveals with unusual clarity a Justice struggling to reconcile his political and judicial visions. Privately convinced of the rightness of desegregation, Jackson worked to ground the Court's result not in his own policy preference but in the terra firma of legal doctrine. His final decision to withhold his concurrence, like his determination to join his brethren for the announcement of the opinion, reflects the resolution of a second conflict, between his natural independence of spirit and his institutional commitment to the Court. Jackson's impulse to explain his own perspective on the Court's collective result is in this instance uncharacteristically restrained in the interest of the Court's authority. Once committed to Warren's opinion, Jackson supported that commitment with his presence as well as his name.

The *Brown* case provided a different test for Rehnquist. As Jackson's law clerk he wrote a six paragraph memo for the Justice captioned "A Random Thought on the Segregation Cases" and signed "whr."[97] The memo, like Jackson's concurrence, dealt with the relationship of the legal and political aspects of the case. It began by comparing the Court's success in reviewing separation of powers issues with its notable lack of success in reviewing conflicts between the individual and the state, an area in which "it has seldom been out of hot water."[98] The memo then approved the Court's rejection of the *Lochner*[99] line of cases: "Apparently it recognized that where a legislature was dealing with its own citizens, it was not part of the judicial function to thwart public opinion except in

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95. *Id.* Prettyman's concluding comments suggest that Jackson's candor, though admirable, might undermine the result he was endorsing:

> But it seems to me in a case of this magnitude, the very attitude of the Court is important, and that attitude should be one of faith rather than futility. If segregation is no longer legal, *of course* the country will not tolerate it—that would be a much better tone in your opinion. After all, this is a great country, and its people are great, and they will not tolerate lawlessness if they are convinced it *is* real lawlessness. How can you expect them to be convinced if you are not yourself?

Id. For the view that Jackson's approach to *Brown* was in some respects preferable to Warren's, see Jeffrey D. Hockett, *Justice Robert H. Jackson and Segregation: A Study of the Limitations and Proper Basis of Judicial Action*, 1989 SUP. CT. HIST. SOC'Y Y.B. 52.

96. SCHWARTZ, *supra* note 92, at 102.

97. The text of the memo is included in the confirmation materials for Rehnquist's appointment as Chief Justice. *See* NOMINATIONS OF SUPREME COURT JUSTICES, *supra* note 42, at 624-25.

98. *Id.* at 624.

99. Lochner v. New York, 198 U.S. 45 (1905).

extreme cases."[100] Turning to the desegregation cases before the Court, the memo accepted the position of John W. Davis, counsel for South Carolina, that the Court was "being asked to read its own sociological views into the Constitution."[101] Because desegregation was "quite clearly not one of those extreme cases which commands [sic] intervention," the memo advised that there was no need for the Court to reach the substantive issue:

> If this Court, because its members individually are "liberal" and dislike segregation, now chooses to strike it down, it differs from the McReynolds court only in the kinds of litigants it favors and kinds of special claims it protects. . . . To the argument made by Thurgood, not John, Marshall, that a majority may not deprive a minority of its constitutional right, the answer must be made that while this is sound in theory, in the long run it is the majority who will determine what the constitutional rights of the minority are. One hundred and fifty years of attempts on the part of the Court to protect minority rights of any kind—whether those of business slaveholders or Jehovah's Witnesses—have all met with the same fate. One by one the cases establishing such rights have been sloughed off, and crept silently to rest. If the present Court is unable to profit by this example it must be prepared to see its work fade in time, too, as embodying only the sentiments of a transient majority of nine men.[102]

The most controversial section of Rehnquist's memo is its final paragraph, which endorses *Plessy v. Ferguson*[103] and its doctrine of separate but equal:

> I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by "liberal" colleagues, but I think *Plessy v. Ferguson* was right and should be re-affirmed. If the Fourteenth Amendment did not enact Spencer's *Social Statics*, it just as surely did not enact Myrdahl's [sic] *American Dilemna* [sic].[104]

This memo surfaced during Rehnquist's first confirmation hearings in 1971 and again, more prominently, at the time of his nomination as Chief Justice. In response to the attacks of his opponents, who criticized his opposition to the *Brown* decision, Rehnquist responded that the memo reflected Jackson's views, not his own. Writing to Senator Eastland, Chairman of the Judiciary Committee, in 1971, Rehnquist insisted that the memo "was intended as a rough draft of a statement of *his* views at the conference of the Justices, rather than as a statement of my views."[105] He pointed to its informal and imperious tone, its historical and philosophical approaches, and the lack of any legal analysis as indicators that the

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100. NOMINATIONS OF SUPREME COURT JUSTICES, *supra* note 42, at 624.
101. *Id.*
102. *Id.* at 624-25.
103. 163 U.S. 537 (1896).
104. NOMINATIONS OF SUPREME COURT JUSTICES, *supra* note 42, at 625.
105. *Id.* at 1505.

memo was "not designed to be a statement of *my* views on these cases. Justice Jackson not only would not have welcomed such a submission in this form, but he would have quite emphatically rejected it and, I believe, admonished the clerk who had submitted it."[106] Rehnquist asserted that the memo's acceptance of *Plessy* "is not an accurate statement of my own views at the time" and concluded with a carefully worded statement approving of *Brown*: "I wish to state unequivocally that I fully support the legal reasoning and the rightness from the standpoint of fundamental fairness of the *Brown* decision."[107]

Rehnquist's version of events received some dubious support in the form of a telegram from Donald Cronson, his co-clerk at the time of the memo who in 1971 was working in London. According to Cronson, he had prepared an earlier memo for Justice Jackson stating that the Court should overrule *Plessy* but leave to Congress the task of desegregating the schools.[108] Jackson then requested a memo arguing that *Plessy* was correctly decided. Addressing Rehnquist, Cronson claimed collaboration on the second memo:

> The memorandum supporting Plessy was typed by you, but a great deal of its content was the result of my suggestions. A number of the phrases quoted in Newsweek I can recognize as having been composed by me, and it is probable that the memorandum is more mine than yours.[109]

When questioned about Cronson's recollection, Rehnquist did not rush to embrace Cronson as his co-author, although this would have furnished a convenient rejoinder to his critics.[110] Because Cronson remained abroad and was never questioned by the committee, there was no opportunity to probe further his account.[111]

There is, however, room for considerable skepticism concerning Rehnquist's claim that the memo reflected Jackson's views. First, as Richard Kluger points out, it seems highly unlikely that Jackson, a remarkably eloquent speaker and confident advocate, would request from a law clerk a precis of his own position for presentation to the other Justices at conference.[112] With the exception of the

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106. *Id.* at 1506.

107. *Id.*

108. *Id.* at 1507.

109. *Id.*

110. In response to a question from Senator Hatch at the 1986 confirmation hearing about Cronson's account, Rehnquist said: "His statement that it embodied a lot of his views, I cannot recall at this time whether it did or not." *Id.* at 611.

111. Noting that Cronson's memo was captioned "A Few Expressed Prejudices on the Segregation Cases," Kluger concludes that the two memos were most likely "invited statements of each clerk's personal views of the case." KLUGER, *supra* note 92, at 605. Kluger raises a number of questions concerning Cronson's account. *Id.* at 606-07.

112. Kluger recounts the objection raised by Elsie Douglas, Jackson's secretary, that Jackson would have no need of assistance from a law clerk in planning his remarks at conference. She termed Rehnquist's version "incredible on its face." *Id.* at 607. At his 1986 hearing, Rehnquist insisted that the use of the pronoun "I" in the memo indicated that it was "[o]bviously something

epigrammatic twist in the final sentence—a favorite rhetorical device of Jackson's—the breezy and assertive voice of the memo bears little relation to Jackson's own more measured style. Although Rehnquist insists in his letter that the informal tone is "not that of a subordinate submitting his own recommendations to his superior (which was the tone used by me, and I believe by the Justice's other clerks),"[113] it is the tone used by Rehnquist in at least one other memo to Jackson. In his certiorari memorandum for *Terry v. Adams*,[114] a case challenging the Jaybird system of candidate selection in Texas, Rehnquist gave Jackson a traditional account of the issues raised and the Fifth Circuit's opinion before his final recommendation:

> CA 5's distinction may appeal, or it may not. I have a hard time being detached about this case, because several of the Rodell school of thought among the clerks began screaming as soon as they saw this that "Now we can show those damn southerners", etc. I take a dim view of the pathological search for discrimination, a la Walter White, Black, Douglas, Rodell, etc, and as result I now have something of a mental block against the case. For that reason, in spite of doubts about its transcending importance in the absence of a conflict among circuits, and notwithstanding my feeling that the decision is probably right to a lawyer, rather than a crusader, I shall over-compensate and recommen [sic] a grant.[115]

In tone as well as subject matter, the *Terry* memo resembles the *Brown* memo.[116] In the *Brown* memo, the speaker has been "excoriated by 'liberal' colleagues" for his support of *Plessy*, on its face a surprisingly harsh phrase for one Justice to use about other members of the Court. In the *Terry* memo, the

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for him to say." NOMINATIONS OF SUPREME COURT JUSTICES, *supra* note 42, at 633. When asked why a memo containing Jackson's views carried the title "A Random Thought on the Segregation Cases," Rehnquist responded "I do not know, Senator." *Id.* at 533.

113. NOMINATIONS OF SUPREME COURT JUSTICES, *supra* note 42, at 1506. Mark Tushnet describes the memos by Rehnquist and Cronson as "written in a relatively informal style that tracked the way in which Jackson expressed himself, and one can see in them efforts by the clerks to turn phrases as Jackson did." Mark Tushnet & Katya Lezin, *What Really Happened in* Brown v. Board of Education, 91 COLUM. L. REV. 1867, 1910 (1991). *See also* MARK TUSHNET, MAKING CIVIL RIGHTS LAW 190 (1994). Tushnet characterizes the sentence referring to "Thurgood, not John, Marshall" as containing "a turn of phrase like Jackson's." Of course, even if Rehnquist was deliberately imitating Jackson's style, he may simply have been attempting to make his own views more appealing to the Justice.

114. 345 U.S. 461 (1953).

115. NOMINATIONS OF SUPREME COURT JUSTICES, *supra* note 42, at 622. According to handwritten notations on the memorandum, certiorari was granted despite Jackson's vote for denial. *Id.*

116. For a general study of Rehnquist's memoranda, see Saul Brenner, *The Memos of Supreme Court Law Clerk William Rehnquist: Conservative Tracts, or Mirrors of his Justice's Mind?*, 76 JUDICATURE 77 (1993).

author is again embattled, this time by "several of the Rodell school of thought among the clerks" who "began screaming" about the claim of racial discrimination in the case. The informality of the style includes the curious grouping of two liberal members of the Court, Black and Douglas, with the executive secretary of the NAACP and a legal academic, Walter White and Fred Rodell, in a manner that borders on disrespect.[117] This is scarcely the submissive tone that Rehnquist's letter claims for all memos to Justice Jackson.

The content of the *Brown* memo, as distinct from its style, also raises questions. As Kluger has persuasively argued, its substance bears little resemblance to the comments subsequently made by Jackson at conference.[118] Further, although Jackson's draft concurrence reveals that he was troubled by the distinction between a political resolution of segregation and a judicial one, he did not reject, as the memo does, any role for the Court in protecting minority rights. The memo states that the Court has been unsuccessful in protecting the rights of all minorities, citing specifically the Jehovah's Witnesses. This would have been a surprising point for Jackson himself to make, because one of his finest hours on the Court was his authorship of the majority opinion in *West Virginia Board of Education v. Barnette*, reversing the Court's prior refusal to protect the right of Jehovah's Witness school children to refuse to salute the flag.[119] In his later years Jackson saw a more limited role for the Court than in the Roosevelt era, but he never embraced the severely restricted role that the memo advances. There is some evidence that the position taken in the memo is much closer to Rehnquist's

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117. As the executive secretary of the NAACP, Walter White was instrumental in launching its litigation campaign for civil rights. *See* KLUGER, *supra* note 92, at 139. He also wrote frequently on topics related to race for numerous magazines of general circulation. For an account of his career, see August Meier & Elliott Rudwick, *Walter White*, *in* DICTIONARY OF AMERICAN NEGRO BIOGRAPHY 646 (Rayford W. Logan & Michael R. Winston eds., 1982). Fred Rodell, a professor at Yale Law School with close ties to Justice Douglas, was an advocate of judicial activism and a confirmed legal realist. He wrote admiringly of Douglas and Black but was a harsh critic of Frankfurter, whose doctrine of judicial restraint Rodell attacked. *See* LAURA KALMAN, LEGAL REALISM AT YALE 147, 154-58 (1986). According to Kalman, Rodell and other Yale faculty members "not only taught their students that judicial activism existed but that liberal activism was good." *Id.* at 155. For samples of Rodell's writings on the Court, see, e.g. *Black and Douglas Affirming* and *For Every Justice, Judicial Deference is a Sometime Thing*, *in* RODELL REVISITED: SELECTED WRITINGS OF FRED RODELL 124, 138 (Loren Ghiglione et al., eds., 1994).

118. KLUGER, *supra* note 92, at 607-09. According to Kluger's reading of Justice Burton's notes,

> [Jackson] thought the Court might be able to justify the abolition of segregation on political grounds, though he did not see how the Justices could claim a judicial basis for the decision. He would likely go along with such a politically framed decision provided it gave the segregating states 'reasonable time' to adjust to the ruling. But if the Court were to rule that the South had been acting illicitly all along, he would have trouble going along.

Id. at 609. For a discussion of Jackson's conference remarks, see *supra* text at note 75.

119. *See* KLUGER, *supra* note 92, at 607.

own views at the time it was written. At his 1986 confirmation hearing, Rehnquist equivocated when asked whether as a law clerk he believed that *Plessy* was wrongly decided, noting that "I saw factors on both sides, I think."[120] He did, however, concede that Cronson's recollection of Rehnquist vigorously defending *Plessy* at the law clerks' lunch table was accurate.[121]

Finally, the sense in both the *Brown* and *Terry* memos of a dangerous liberal force at work on the Court echoes another Rehnquist piece, *Who Writes the Decisions of the Supreme Court?*,[122] written in 1957 for a news magazine. Although in his brief essay Rehnquist rejected the notion of "the law clerk as a legal Rasputin" influencing Court decisions, he did see an invidious role for law clerks in the certiorari process, where they might unconsciously slant the materials presented to their Justices.[123] Although he admitted that he too "was not guiltless on this score," he clearly saw the real danger coming from the clerks who shared what he called "the political philosophy now espoused by Chief Justice Earl Warren."[124] Drawing from his own time on the Court, Rehnquist considered it "fair to say that the political cast of the clerks as a group was to the 'left' of either the nation or the Court."[125] These liberal extremists, like the screaming clerks of the *Terry* memo and the excoriating liberal colleagues of the *Brown* memo, are denounced by the admittedly conservative Rehnquist as agents of improper Court activism.

On balance, then, it is hard not to agree with Richard Kluger and Bernard Schwartz that Rehnquist was expressing his own views in the *Brown* memo.[126]

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120. NOMINATIONS OF SUPREME COURT JUSTICES, *supra* note 42, at 447.

> I thought that—putting myself back in 1952 as best I can—I thought that *Plessey* against *Ferguson* was wrong in saying that when you segregate races by law you are not depriving anybody of equal protection. I also thought that *Plessey* against *Ferguson* had been on the books for 69 years, that the same Congress that promulgated the 14th amendment had required segregated schools in the District. I saw factors on both sides, I think.

Id. at 446-47.

121. Rehnquist responded: "Again, it is hard to remember back, but I think it probably seemed to me at the time that some of the others simply were not facing the arguments on the other side, and I thought they ought to be faced." *Id.* at 586.

122. *Who Writes Decisions*, *supra* note 65.

123. *Id.* at 75.

124. Rehnquist defines the "tenets" of this philosophy as: "extreme solicitude for the claims of Communists and other criminal defendants, expansion of federal power at the expense of State power, great sympathy toward any government regulation of business." *Id.* at 75.

125. *Id.*

126. *See* Schwartz, *supra* note 75, at 247. Mark Tushnet has a kinder interpretation of Rehnquist's authorship of the memorandum, suggesting that the memorandum "catches one side of Jackson's ambivalence, stating it probably more forcefully than Jackson himself would have, but only because Jackson's expression would have been constrained by his ambivalence in a way that Rehnquist's was not." Tushnet & Lezin, *supra* note 113, at 1911. *See also*, TUSHNET, *supra* note 113, at 190. Tushnet also proposes another explanation: "Jackson may have sent Rehnquist off to

With a seat on the Supreme Court almost in his grasp, Rehnquist may well have retreated from an uncomfortable position taken almost twenty years earlier in the only way that seemed open to him. That such a step might unfairly tarnish the reputation of Justice Jackson years after his death does not seem to have been a concern. In any event, *Brown* provides a touchstone for the careers of the two Justices, one ending and the other just beginning. For Jackson, who wrestled with the moral and jurisprudential problems posed by the case, his presence on the bench for the announcement of the Court's unanimous opinion signifies his commitment to the institutional role of the Court in doing justice. For Rehnquist, who disagreed with the Court's result, his memo and subsequent disowning of it signify a more confidently political attitude toward the work of the Court and his own membership on it.

II. TWO VOICES ON THE BENCH

A. Justice Jackson

In his thirteen years on the Supreme Court, Justice Jackson shaped a canon that defies easy categorization. He was, in Paul Freund's words, "a complex and altogether unmechanical individual,"[127] a Justice who tended to decide each case on its merits and let the inconsistencies fall where they may. This is not to suggest

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write the memorandum in *Brown* as a way of dealing with Rehnquist's enthusiasm, allowing Rehnquist to believe that Jackson took his views seriously when the point of the exercise was actually merely to keep Rehnquist from bothering Jackson." Tushnet & Lezin, *supra* note 113, at 1912 n.191.

127. Paul A. Freund, *Individual and Commonwealth in the Thought of Mr. Justice Jackson*, 8 STAN. L. REV. 9, 24 (1955). Walter F. Murphy has called Jackson "an enigma. Brilliant, eloquent, but erratic—this has been the typical judgment on Jackson the Judge." Walter F. Murphy, *Mr. Justice Jackson, Free Speech, and the Judicial Function*, 12 VAND. L. REV. 1019 (1959). For other commentaries on Jackson's career, many written at the time of his death and consequently appreciative rather than critical, see Simon E. Sobeloff, In Memory of Mr. Justice Jackson, Proceedings in the Supreme Court of the United States, 349 U.S. xxvii (1955); GLENDON SCHUBERT, DISPASSIONATE JUSTICE: A SYNTHESIS OF THE JUDICIAL OPINIONS OF ROBERT H. JACKSON (1969); Charles Fairman, *Associate Justice of the Supreme Court*, 55 COLUM L. REV. 445 (1955); Felix Frankfurter, *Foreword*, 55 COLUM. L. REV. 435 (1955); Felix Frankfurter, *Mr. Justice Jackson*, 68 HARV. L. REV. 937 (1955) [hereinafter *Mr. Justice Jackson*]; Eugene C. Gerhart, *A Decade of Mr. Justice Jackson*, 28 N.Y.U. L. REV. 927 (1953); Louis L. Jaffe, *Mr. Justice Jackson*, 68 HARV. L. REV. 940 (1955); James A. Nielson, *Robert H. Jackson: The Middle Ground*, 6 LA. L. REV. 381 (1945); Glendon Schubert, *Jackson's Judicial Philosophy: An Exploration in Value Analysis*, 49 AMER. POL. SCI. REV. (1965); James M. Shellow, *An Analysis of Judicial Methodology: Selected Opinions of Justice Robert H. Jackson*, 45 MARQ. L. REV. 103 (1961); Dwight J. Simpson, *Robert H. Jackson and the Doctrine of Judicial Restraint*, 3 UCLA L. REV. 325 (1956); Paul A. Weidner, *Justice Jackson and the Judicial Function*, 53 MICH. L. REV. 567 (1955); Dorothy B. James, Judicial Philosophy and Accession to the Court: The Cases of Justices Jackson and Douglas (1966) (unpublished dissertation).

that Jackson left behind a chaotic body of opinions. There are certain clear themes which emerge with regularity. Jackson believed strongly in the separation of powers among the branches of government, with a limited role for the Court and substantial deference to the legislative and executive branches. He was a strong proponent of federalism, insisting as well on deference to the states. In the area of civil liberties, Jackson, especially after his return from Nuremberg, defended the right of the community to enforce its standards against the disruptive conduct of nonconforming individuals. Yet it was characteristic of Jackson that, on each issue, he authored opinions which came out the other way. He was never doctrinaire in his resolution of cases; the facts of each situation dictated the result, and he brought to each case a lawyer's eye for the point at which the boundaries of doctrine had been crossed.

Jackson's tendency to reexamine and refine doctrine appears in a number of cases arising from the nation's increasing concern, following the start of World War II, with security measures. In 1943 he joined, without separate comment, Chief Justice Stone's opinion for the Court in *Hirabayashi v. United States*[128] upholding a curfew for American citizens of Japanese ancestry as a valid emergency war measure. Eighteen months later, however, Jackson was one of three dissenters in *Korematsu v. United States*,[129] when the majority upheld a military order excluding those citizens from a designated military area in the West. Jackson's dissent first distinguishes between the kinds of decisions made by the military and the judiciary. For the military, "the paramount consideration is that its measures be successful, rather than legal."[130] While Jackson the pragmatist respects that standard, Jackson the jurist rejects it as in any way binding on the Court. Because "[i]n the very nature of things, military decisions are not susceptible of intelligent judicial appraisal," the Court cannot evaluate them on their own terms.[131] The Court's standard is not success but constitutionality, and its willingness to accept blindly such military imperatives would, in Jackson's view, be "a far more subtle blow to liberty than the promulgation of the order itself."[132]

Having established how high the stakes are, Jackson then turns to the jurisprudential issue the case presents. Quoting Cardozo for "'the tendency of a principle to expand itself to the limit of its logic,'"[133] Jackson dismisses the majority's reliance on *Hirabayashi* as authority for upholding the exclusion order. Stone's opinion was carefully crafted to limit its result to the curfew at issue in the earlier case; for Jackson, the "mild and temporary deprivation of liberty" in *Hirabayashi* could not furnish authority for the much broader deprivation imposed by the order in *Korematsu*.[134] There are two characteristic strains at work in

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128. 320 U.S. 81, 92 (1943).
129. 323 U.S. 214, 242 (1944) (Jackson, J., dissenting).
130. *Id.* at 244.
131. *Id.* at 245.
132. *Id.* at 245-46.
133. *Id.* at 246.
134. *Id.* at 247.

Jackson's dissent. First, he is at pains to distinguish the Court's role from that of another government entity and to assert judicial independence. Second, he is more comfortable engaging in the delicate art of linedrawing than accepting the cruder and easier distinction offered by stare decisis. The case ultimately hinges on its facts—the nature of the deprivation under this military order—rather than on any abstract notion of national security.

Another variation on this theme appears in a later pair of cases concerning national security issues, *Dennis v. United States*[135] and *American Communications Association v. Douds*;[136] both cases involved the rights of Communists, and both were decided in the spring of 1950. In *Dennis*, the Court upheld the conviction for contempt of Congress of the General Secretary of the Communist Party over the claim that a jury containing government employees was not impartial under the Sixth Amendment.[137] Jackson concurred in the result, bound by the Court's earlier decision in *Frazier v. United States*[138] upholding the constitutionality of a jury composed entirely of government employees.[139] Despite his dissent in *Frazier*, Jackson voted to uphold the conviction. To do otherwise, he noted, would be to enact "a partial repeal—for Communists only."[140] Jackson ends his concurring opinion by placing the concern about Communists in perspective. They are, he notes, "the current phobia in Washington," but other groups have occupied that position in the past and been tried for various offenses;[141] there is no basis in law for exempting Communists from the *Frazier* rule. The point is made with a typical Jackson flourish: "But so long as accused persons who are Republicans, Dixiecrats, Socialists, or Democrats must put up with such a jury, it will have to do for Communists."[142]

Jackson's insouciance about "the current phobia" should not be read to signal a broader complacency about the Communist threat. In *Douds*, his lengthy separate opinion outlined with great care the arguments supporting Congress' conclusion that "the Communist Party is a conspiratorial and revolutionary junta, organized to reach ends and to use methods which are incompatible with our constitutional system."[143] In light of that evidence, Jackson had no difficulty joining with the majority to uphold the constitutionality of a federal statute requiring union officials to sign affidavits disclosing membership in the Communist Party. Jackson balked, however, at joining the second prong of the Court's opinion, which upheld as well the statutory requirement of an oath by union officials that they did not believe in the forceful overthrow of the United

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135. 339 U.S. 162 (1950).

136. 339 U.S. 382 (1950).

137. *Dennis*, 339 U.S. at 172.

138. 335 U.S. 497 (1948) (Jackson, J., dissenting).

139. *Dennis*, 339 U.S. at 174 (Jackson, J., concurring).

140. *Id.*

141. *Id.* at 175.

142. *Id.*

143. American Communications Ass'n v. Douds, 339 U.S. 382, 424 (1950) (Jackson, J., concurring and dissenting).

States government. The distinction between action and thought, however distasteful the latter, was crucial to Jackson, who rejected the power of the government to constrain belief disconnected from any overt act.[144] More interestingly, Jackson linked the Communist goal with the sacred history of America's origins, reminding the Court that "we cannot ignore the fact that our own Government originated in revolution and is legitimate only if overthrow by force may sometimes be justified."[145] His own political rejection of Communism was for Jackson readily separable from his judicial rejection of government censorship. The point is made with another of Jackson's characteristic inversions: "It is not the function of our Government to keep the citizen from falling into error; it is the function of the citizen to keep the Government from falling into error."[146] Once again, Jackson drew a line between appropriate and intrusive extensions of established doctrine.

In these and other opinions Jackson displayed what Paul Freund aptly described as "a dialectical mind—recognizing principles in collision."[147] Writing on issues of individual rights, Jackson frequently identified a collision of two principles he valued highly, liberty and order. He most often struck his balance in favor of order, but it was never without according due respect and serious consideration to the claims of liberty. In several cases Jackson sided with communities affronted by intrusive individuals—Jehovah's Witnesses ringing doorbells,[148] sending a child to sell religious literature to passersby in the streets,[149] or using a loudspeaker to voice religious beliefs,[150] or a hatemongering speaker at a political rally[151]—though only after weighing "the realities of life in those communities"[152] from a pragmatic perspective. Both his years in Jamestown and his experiences at the Nuremberg trials gave Jackson a powerful appreciation for the right of a community to protect its local interests without interference from the courts.[153]

Yet in one of his most celebrated opinions, *West Virginia State Board of Education v. Barnette*,[154] Jackson struck the balance strongly in favor of liberty by invalidating a resolution requiring Jehovah's Witness schoolchildren to salute the American flag. The elements of his opinion echo the familiar strains of his jurisprudence. First, Jackson defines the conflict in *Barnette* as one between government authority and individual rights; he carefully notes that the right

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144. *Id.* at 437.

145. *Id.* at 439.

146. *Id.* at 442-43.

147. Paul A. Freund, *Mr. Justice Jackson and Individual Rights*, *in* MR. JUSTICE JACKSON, *supra* note 6, at 36.

148. Douglas v. City of Jeannette, 319 U.S. 157, 166 (1943) (Jackson, J., concurring).

149. Prince v. Massachusetts, 321 U.S. 158, 176 (1944) (Jackson, J., concurring).

150. Saia v. New York, 334 U.S. 558, 566 (1948) (Jackson, J., dissenting).

151. Terminiello v. Chicago, 337 U.S. 1, 13 (1949) (Jackson, J., dissenting).

152. *Douglas*, 319 U.S. at 174.

153. *See, e.g.*, *Saia*, 334 U.S. at 571-72.

154. 319 U.S. 624 (1943).

claimed by the children "does not bring them into collision with rights asserted by any other individual"[155] and thus avoids further complexity. Second, as in *Douds*, the government is compelling the children to make "affirmation of a belief and an attitude of mind,"[156] this time in the interest of national unity. However admirable the goal, especially in the midst of war, Jackson has little patience for governmental coercion toward conformity. His eloquent conclusion cannot be improved by paraphrase: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[157] The rights of the community vindicated in other First Amendment cases here fall before what was for Jackson one of the dominant principles of the Constitution, the individual's right to freedom of thought and belief.[158]

In all of these opinions, Jackson resolves a dialectical tension between rights claimed by an individual under the Constitution and those claimed by the government as an expression of the community's political choice. This tension between law and politics emerged in a different guise when Jackson faced disputes between branches of the federal government over the limits of executive power. As a former member of Roosevelt's inner circle of advisers, Jackson was no stranger to the imperatives of the presidential will. As Justice, however, Jackson gave the executive branch no more than its due when he resolved collisions with other branches of government. Writing for the Court to deny judicial review of administrative orders that were subject to presidential approval, Jackson offered a strong but reasoned defense of executive prerogatives.[159] After noting that the President has access to intelligence sources not properly available to others, Jackson defended the political nature of the decisions at issue, grants of permits for air transportation routes abroad:

> But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people

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155. *Id.* at 630.

156. *Id.* at 633.

157. *Id.* at 642.

158. Jackson believed that the strongest protection was owed to individuals rather than to groups. Noting that the Court in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951), had granted administrative hearings to groups designated subversive by the Attorney General but not to individual government employees discharged for membership in those organizations, Jackson commented: "So far as I recall, this is the first time this Court has held rights of individuals subordinate and inferior to those of organized groups. I think this is an inverted view of the law—it is justice turned bottom-side up." *Id.* at 186 (Jackson, J., concurring).

159. Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103 (1948).

> whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.[160]

Jackson's argument is based not on the inherent power of the executive branch but on the foreign policy implications of the orders and their political consequences. His opinion links together the two political branches, with their direct ties to the people, in opposition to the judicial branch, which lacks both competence and accountability. The four dissenters, in an opinion authored by Justice Douglas, agreed with the majority that the presidential decisions should not be subject to review by the courts;[161] they disagreed only as to the propriety of judicial review for orders issued directly by the Civil Aeronautics Board.[162] Jackson's view, therefore, represents the consensus of the Court that the President enjoys substantial discretion in matters of foreign relations.

Jackson revisited the issue of presidential power in *Youngstown Sheet & Tube Co. v. Sawyer*, where his concurrence overshadowed Justice Black's more circumscribed opinion for the Court that ruled President Truman's seizure of the nation's steel mills to be invalid as an unauthorized act of presidential lawmaking.[163] For Jackson, the issue of presidential power was less easily resolved, perhaps because he self-consciously brought to it his own experience in the executive branch. Rejecting subterfuge, Jackson opened his concurrence with a candid acknowledgment of his past service to Roosevelt and its influence on his present perspective: "That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal adviser to a President in time of transition and public anxiety."[164] Jackson's service included advising President Roosevelt in June 1941 that seizure of the North American Aviation plant by the government was permissible when an unauthorized strike threatened production. The text of Jackson's statement on North American Aviation reads like a summary of the government's argument in *Youngstown*. Jackson relied first on the constitutional injunction to the President "'to take care that the laws be faithfully executed,'"

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160. *Id.* at 111.

161. *Id.* at 115.

162. *Id.* at 115-16.

163. 343 U.S. 579, 587 (1952).

164. *Id.* at 634 (Jackson, J., concurring). For another example of Jackson's candor in this regard, see McGrath v. Kristensen, 340 U.S. 162, 176 (1950) (Jackson, J., concurring), where Jackson acknowledged that because his position in the case was "contrary to an opinion which, as Attorney General, I rendered in 1940, I owe some word of explanation." *Id.* His explanation took the form of a critique of his own prior view, which he termed "as foggy as the statute the Attorney General was asked to interpret." *Id.* The opinion is often cited for Jackson's urbane apologia for his prior error, which ended with the following plea: "If there are other ways of gracefully and good-naturedly surrendering former views to a better considered position, I invoke them all." *Id.* at 178. For Rehnquist's citations to this passage, see *infra* note 270.

supported by "the aggregate of all such laws plus that wide discretion as to method vested in him by the Constitution for the purpose of executing the laws."[165] The second source of authority came from the constitutional designation of the President as commander-in-chief, with concomitant powers "placed in his sole command" to ensure "the continued existence of the Nation."[166] After describing the threat created by Communist inspired labor agitation at the plant, Jackson's statement concluded by blending the President's inherent powers into authority sufficient to support the plant seizure: "There can be no doubt that the duty constitutionally and inherently rested upon the President to exert his civil and military, as well as his moral, authority to keep the defense effort of the United States a going concern."[167] For the presidential adviser, then, the bare constitutional language is transformed, principally by the force of assertion, into a moral mandate to take any steps necessary for the survival of the nation.

When Jackson approached the seizure issue over a decade later as a Justice, the result was a considerably more skeptical account of presidential power. Jackson understood the government's reliance on the North American Aviation seizure as precedent and took pains to distinguish the two episodes on their facts, both at oral argument and in his opinion.[168] When Solicitor General Perlman told Jackson in court that the government did "lay a lot of it at your door,"[169] Jackson was candid in his response. "I claimed everything, of course, like every other Attorney General does," he conceded; "[i]t was a custom that did not leave the Department of Justice when I did."[170] Writing from the bench, however, Jackson was careful to separate the enthusiasm of advocacy from the sober analysis of jurisprudence. He observed that "I do not regard [North American Aviation] as a precedent for this, but, even if I did, I should not bind present judicial judgment by earlier partisan advocacy."[171]

In his concurrence Jackson systematically demolished the argument he had made as Attorney General on behalf of the President. The constitutional language vesting executive power in the President was not a grant of power but only "an

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165. 89 Cong. Rec. 3992 (May 5, 1943).

166. *Id.*

167. *Id.*

168. Jackson noted that North American Aviation was under contract to the United States government; that Congress had expressly authorized seizure of plants that "refused to comply with Government orders;" that the owners of the plant had acquiesced in the seizure; that labor leaders approved of the seizure because the strike was in violation of collective bargaining agreements; and that the strike was "described as in the nature of an insurrection, a Communist-led political strike against the Government's lend-lease policy." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 649 n.17 (1952). In contrast, the steel plant seizure was "only a loyal, lawful, but regrettable economic disagreement between management and labor" involving no government property. *Id.* *See also* MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE 172 (1977).

169. MARCUS, *supra* note 168, at 172.

170. *Id.*

171. *Youngstown Sheet & Tube Co.*, 343 U.S. at 649 n.17.

allocation to the presidential office of the generic powers thereafter stated."[172] Otherwise, there would have been no need for the Framers to describe specific executive powers. The President's role as commander-in-chief should not be read to usurp Congress' constitutional power to declare war or to provide military forces.[173] Such an expansion of the President's military role to control civilian matters would carry the gravest danger: "No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role."[174] Finally, the constitutional language authorizing the President to "take Care that the Laws be faithfully executed" must be balanced against the protections of the Due Process Clause in a government of laws.[175]

Jackson was equally severe with the broader argument that the President's inherent powers increase through the conduct of prior administrations, particularly in cases of national emergency. Again, Jackson distinguished the political impulse to claim sweeping presidential power from the judicial response:

> The claim of inherent and unrestricted presidential powers has long been a persuasive dialectical weapon in political controversy. While it is not surprising that counsel should grasp support from such unadjudicated claims of power, a judge cannot accept self-serving press statements of the attorney for one of the interested parties as authority in answering a constitutional question, even if the advocate was himself. But prudence has counseled that actual reliance on such nebulous claims stop short of provoking a judicial test.[176]

Jackson relied on the text of the Constitution, which provides for emergency powers only with regard to the suspension of habeas corpus, as a full response to the government's argument, although he noted that the experience of other nations suggested that wisdom as well as constitutional analysis supported the Court's result.[177]

Jackson's concurrence is generally valued less for its critique of the government's position than for its own formulation, which reflects Jackson's executive branch experience in its pragmatic assessment of presidential power.[178] That experience, he reflected, was probably "a more realistic influence on my views than the conventional materials of judicial decision which seem unduly to accentuate doctrine and legal fiction."[179] In his celebrated scheme, Jackson divided presidential acts into three categories: those performed with congressional authorization, those performed in the absence of congressional authorization, and

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172. *Id.* at 641.
173. *Id.* at 642-44.
174. *Id.* at 646.
175. *Id.*
176. *Id.* at 647.
177. *Id.* at 650-51.
178. *See, e.g.*, MARCUS, *supra* note 168, at 205-06.
179. *Youngstown Sheet & Tube Co.*, 343 U.S. at 634.

those performed in opposition to the express will of Congress.[180] Although he found that the seizure of the steel mills fell into the third category and thus was clearly invalid, Jackson was most interested in the second category, his "zone of twilight," where presidential and congressional power may overlap.[181] It is here, in Jackson's view, that questions of power are likely to be resolved by "the imperatives of events and contemporary imponderables rather than on abstract theories of law."[182] In such situations, the President has a strong advantage, bringing to the contest his singular status as the most prominent figure in government and the additional weight that comes from his role as leader of his political party.[183] The Court, then, should not further distort the constitutional balance by acting "further to aggrandize the presidential office, already so potent and so relatively immune from judicial review, at the expense of Congress."[184] Although Jackson had no confidence that Court doctrine could keep power in the hands of an acquiescent Congress, neither was he willing to have the Court assist in the unauthorized transfer of power from the legislative to the executive branch.

The *Youngstown Sheet & Tube Co.* concurrence is the perfect fusion of the two strains in Jackson's jurisprudence. The pragmatic Jackson, schooled in the politics of the Roosevelt administration, understood the opportunities for enhancement of executive power that the flexibility of the constitutional scheme offers. At the same time, the doctrinal Jackson, schooled as well in the complexities of the Constitution, understood the delicate balance among the branches that the Framers intended. Although Jackson at his most judicial writes that to preserve freedom it is necessary "that the Executive be under the law, and that the law be made by parliamentary deliberations,"[185] the opinion does not end with this noble exhortation. There is a brief coda that puts in perspective both the seriousness of the issue before the Court and its own role in the constitutional design: "Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up."[186]

B. Chief Justice William Rehnquist

If Justice Jackson had a dialectical cast of mind, then Chief Justice Rehnquist might aptly be described as a monist, someone for whom a single principle controls and resolves a controversy.[187] Nowhere in Rehnquist's jurisprudence do we see him torn between conflicting beliefs and obligations as Jackson was in

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180. *Id.* at 635-38.

181. *Id.* at 637.

182. *Id.*

183. *Id.* at 653-54.

184. *Id.* at 654.

185. *Id.* at 655.

186. *Id.*

187. The *New Shorter Oxford English Dictionary* defines "monism" as "[a] theory or system of thought which recognizes a single ultimate principle, being, force, etc., rather than more than one." 1 THE NEW SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 1814 (1993).

Brown and *Youngstown Sheet & Tube Co.* The hallmark of Rehnquist's opinions is their air of certainty, their conviction that the result he endorses is not only correct but inevitable. Other Justices have at times expressed publicly their private anguish at finding that their judicial principles compel a result at variance with their personal convictions: Justice Frankfurter voting to uphold the school board's right to compel the children's flag salute in *West Virginia State Board of Education v. Barnette* despite his membership in "the most vilified and persecuted minority in history,"[188] or Justice Kennedy voting to strike down as unconstitutional a state flag burning statute despite his "keen sense that this case, like others before us from time to time, exacts its personal toll."[189] Rehnquist's opinions are unmarked by such inner tensions. His disquietude is instead directed toward the perversity of his colleagues who reject his carefully considered conclusions.

One consequence of Rehnquist's monism is the predictability of his votes. Mark Tushnet has offered one explanation for this, speculating that "[o]ne could account for perhaps ninety percent of Chief Justice Rehnquist's bottom-line results by looking, not at anything in the *United States Reports*, but rather at the platforms of the Republican Party."[190] Other Rehnquist scholars have attributed his

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188. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting). Frankfurter's solitary dissent sharply delineated the conflict between his personal and judicial beliefs:

> Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores.

Id. at 646-47.

189. Texas v. Johnson, 491 U.S. 397, 420-21 (1989) (Kennedy, J., concurring). Kennedy made plain his "distaste" for the result he endorsed:

> The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases.

Id.

190. Mark Tushnet, *A Republican Chief Justice*, 88 MICH. L. REV. 1326, 1328 (1990). Tushnet notes that he does not "mean the reduction of constitutional adjudication to party politics as a criticism of the Chief Justice, for much the same could be said of almost all of his colleagues, with the obvious changes in reference to the platform of the other party in the appropriate cases." *Id. See also* Nicholas S. Zeppos, *Chief Justice Rehnquist, The Two Faces of Ultra-Pluralism, and the Originalist Fallacy*, 25 RUTGERS L. J. 679, 679 (1994) (noting that "[a]s much as any other recent or sitting Justice, Chief Justice Rehnquist's votes line up with what are generally considered his policy preferences").

consistency to a core of governing principles that are applied with regularity. In a seminal article that reviewed Rehnquist's first four Terms on the Court, David Shapiro identified three such principles: resolution of conflicts between an individual and the government in favor of the government; resolution of conflicts between state and federal authority in favor of the state; and resolution of questions of federal jurisdiction against the exercise of that jurisdiction.[191] Although subsequent scholars have defined these governing principles in slightly different ways,[192] the point has been made with Rehnquistian regularity that the body of Rehnquist's opinions holds few surprises for the experienced reader of his work. In this regard he is again in sharp contrast to Jackson, whose jurisprudential principles, although readily identifiable, were no guarantee of the result in any particular case.

For a dialectical mind like Jackson's, the method for deciding a difficult case involves the comparison of competing positions and their resolution, often by an accommodation, as in *Youngstown Sheet & Tube Co.*, or by a careful act of linedrawing, as in *Korematsu*. For a monistic mind like Rehnquist's, there is no dialogue of plausible but competing views, because only a single principle is acknowledged as relevant and valid. Instead, Rehnquist tends to organize his

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191. David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 294 (1976). Shapiro argues that Rehnquist's "unyielding insistence on a particular result" has taken its toll in a flawed jurisprudence, "contribut[ing] to a wide discrepancy between theory and practice in matters of constitutional interpretation, to unwarranted relinquishment of federal responsibilities and deference to state law and institutions, to tacit abandonment of evolving protections of liberty and property, sacrifice of craftsmanship, and to distortion of precedent." *Id.* at 299.

192. For later identifications and analyses of the principles governing Rehnquist's jurisprudence, see, e.g., SUE DAVIS, JUSTICE REHNQUIST AND THE CONSTITUTION 24-28 (1989) (a democratic model based on majority rule; moral relativism; and a fixed textual meaning for the Constitution); Thomas Kleven, *The Constitutional Philosophy of Justice William H. Rehnquist*, 8 VT. L. REV. 1, 12 (1983) (the fostering of states' rights); Thomas W. Merrill, *Chief Justice Rehnquist, Pluralist Theory, and the Interpretation of Statutes*, 25 RUTGERS L. J. 621, 624 (1994) (pluralist political theory); Robert E. Riggs & Thomas D. Proffitt, *The Judicial Philosophy of Justice Rehnquist*, 16 AKRON L. REV. 555, 567 (1983) (the Constitution as a governmental charter imposing federalism; majority rule; and the Framers' intent as a restraint on the exercise of judicial review); David W. Rohde & Harold J. Spaeth, *Ideology, Strategy and Supreme Court Decisions: William Rehnquist as Chief Justice*, 72 JUDICATURE 247, 250 (1989) (no shift in views upon becoming Chief Justice). For general studies of Rehnquist's jurisprudence, see, e.g., Harry M. Clor, *Chief Justice Rehnquist and the Balances of Constitutional Democracy*, 25 RUTGERS L. J. 557 (1994); Jonathan R. Macey, *Chief Justice Rehnquist, Interest Group Theory, and the Founders' Design*, 25 RUTGERS L. J. 577 (1994); Earl M. Maltz, *No Rules in a Knife Fight: Chief Justice Rehnquist and the Doctrine of Stare Decisis*, 25 RUTGERS L. J. 669 (1994); Nancy Maveety, *The Populist of the Adversary Society: The Jurisprudence of Justice Rehnquist*, 13 J. CONTEMP. L. 221 (1987); Jeff Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L. J. 1317 (1982). For analyses of Rehnquist's methodology, see John Denvir, *Judging Justices: Rehnquist, Brennan, and the Question of Judicial Method*, 22 TOLEDO L. REV. 757 (1991); Mark C. Rahdert, *William Rehnquist's Judicial Craft: A Case Study*, 60 TEMP. L. Q. 841 (1987).

opinions thematically, assembling a cluster of responses that radiate from the controlling principle, usually at a high level of abstraction. Jackson's opinions typically concern themselves with the specific facts of a case, because those facts may determine where a line is to be drawn. Rehnquist's opinions, however, typically show little interest in the facts, because a case is more likely to be viewed as illustrative of a broader problem than as significant for its particularity.

One of Rehnquist's preferred themes is history. He has quoted with appreciation Justice Holmes' observation that "'a page of history is worth a volume of logic,'"[193] and a number of his opinions are propelled by elaborate descriptions of historical events. These accounts are not merely preliminary to a discussion of doctrine; they are, in Rehnquist's hands, themselves a source of doctrine, because in matters of statutory and constitutional interpretation he views what happened in the past as an irrefutable determinant of present cases. In *Leo Sheep Co. v. United States*,[194] for example, Rehnquist wrote for a unanimous Court to reject the government's claim of an implied easement over land granted to the Union Pacific Railroad by an 1862 statute. Although the decision purports to rest principally on the absence of any reservation of rights in the statute, almost one-half of the opinion is devoted to an account of the opening of the American West by government strategies to encourage the completion of a transcontinental railroad.[195] Rehnquist introduces this narrative as a valuable means of understanding a statute by understanding "'the history of the times when it was passed,'"[196] but it is clear that for him the narrative possesses an independent value as well. Whatever the text of the statute may say, the subtext of this decision is that in granting land in exchange for the building of the railroad, the government has reaped the benefit of its bargain and should not now be permitted to offer technical legal theories to claim an additional advantage. It is not irrelevant that a government victory would come at the expense of private landowners, but Rehnquist treads lightly on that theme.[197] Instead, he allows the sweep of history to argue the landowners' case.

Rehnquist's dissent in *Texas v. Johnson*,[198] the Court's first flag burning case, offers a variant of this method. The first section of his opinion catalogues the appearances of the flag in American history, starting with the Revolutionary War and including sixty lines of "Barbara Frietchie" by John Greenleaf Whittier.[199] When Rehnquist reaches his First Amendment argument, that flag burning is not a form of expression, he spends little time supporting his assertion that "flag

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193. Texas v. Johnson, 491 U.S. 397, 421-22 (1989) (Rehnquist, C.J., dissenting) (quoting New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921)).

194. 440 U.S. 668 (1979).

195. *Id.* at 670-77.

196. *Id.* at 669 (quoting United States v. Union Pacific R. Co., 91 U.S. 72, 79 (1875)).

197. At the end of the opinion, Rehnquist notes "the special need for certainty and predictability where land titles are concerned" and the fact that a government easement would provide "public thoroughfares without compensation." *Id.* at 687-88.

198. Texas v. Johnson, 491 U.S. 397, 421 (1989) (Rehnquist, C.J., dissenting).

199. *Id.* at 422-28.

burning is the equivalent of an inarticulate grunt or roar."[200] He describes the facts surrounding the flag burning only briefly, quoting the slogans chanted by Johnson but devoting only a single sentence to his political message, a protest against nuclear weapons.[201] Instead, he lets the earlier account of the privileged position accorded the flag over two hundred years refute the Court's contrary decision and support the hyperbole of his own conclusion that "[u]ncritical extension of constitutional protection to the burning of the flag risks the frustration of the very purpose for which organized governments are instituted."[202] In methodology, *Johnson* reads in some respects like a parody of *Leo Sheep Co.*, because the historical and literary materials Rehnquist selects have a random quality that is dizzying rather than compelling. Both opinions, however, show Rehnquist using such extralegal materials to advance by indirection a unitary thesis and to foster a sense of inevitability for his conclusion.

Rehnquist's use of history is most frequent in the context of constitutional interpretation, where he has consistently argued that the Constitution must be read according to the intention of its Framers.[203] His dissent in *Wallace v. Jaffree*, a case in which the Court struck down under the Establishment Clause an Alabama statute authorizing a moment of silence in public schools,[204] is a remarkably pure use of history as the basis for his position. At no point in his opinion does Rehnquist refute the majority's view that the statute at issue failed the *Lemon* test because it "had *no* secular purpose."[205] Instead, Rehnquist selects as his focus what he sees as the Court's longstanding but erroneous reliance on Jefferson's metaphor of the wall of separation between church and state. For sixteen pages Rehnquist describes the drafting of the First Amendment, the passage of the Northwest Ordinance, presidential Thanksgiving proclamations, public funds for religious schools, and the works of nineteenth century legal scholars to support his position that Madison rather than Jefferson is the proper authority to follow and

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200. *Id.* at 432.

201. *Id.* at 431. Rehnquist notes only that Johnson "engaged in a 'die-in' to protest nuclear weapons." *Id.* Justice Brennan's majority opinion opens with a more elaborate account of the episode and of Johnson's message: "As explained in literature distributed by the demonstrators and in speeches made by them, the purpose of this event was to protest the policies of the Reagan administration and of certain Dallas-based corporations." *Id.* at 399.

202. *Id.* at 435.

203. *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 568 (1991) (Rehnquist, C.J., dissenting) ("the statute's purpose of protecting societal order and morality is clear from its text and history"); Hustler Magazine v. Falwell, 485 U.S. 46, 53-55 (1988) ("From the viewpoint of history it is clear that our political discourse would have been considerably poorer without [political cartoons.]"); Furman v. Georgia, 408 U.S. 238, 466 (1972) (Rehnquist, J., dissenting) ("The answer, of course, is found in Hamilton's Federalist Paper No. 78 and in Chief Justice Marshall's classic opinion in Marbury v. Madison, 1 Cranch 137 (1803)."). For a strong critique of Rehnquist's use of constitutional history to support his view of federalism, see Powell, *supra* note 192.

204. 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting).

205. *Id.* at 56.

that Madison's view endorsed prayer within the constitutional framework.[206] The final six pages of the opinion attack the usefulness of the *Lemon* test;[207] there is only a brief mention, in the opinion's final paragraphs, of the Court's position.[208] The dissent contains a substantive position, that Jefferson's wall of separation metaphor is an inaccurate basis for interpreting the Establishment Clause, argued in a manner that renders the specific content of the Alabama statute irrelevant. Even that abstraction, however, is eclipsed by the organizing theme of the opinion: "The true meaning of the Establishment Clause can only be seen in its history."[209] If the facts of the case are subordinated to the vanquishing of Jefferson's metaphor, that battle in turn is subordinated to Rehnquist's powerful and recurrent reliance on history as an answer to doctrine.

Rehnquist's tendency to write constitutional opinions at a high level of abstraction allows him to rely less on specific constitutional text than on what he calls "the logic of the constitutional plan."[210] In a dissent based on his view of federalism, Rehnquist criticized the Court's "literalism" in relying on the text of Article III and the Eleventh Amendment to find no immunity to suit against one state in the court of another state.[211] In another federalism dissent, he identified the source of Ohio's right to be beyond the reach of the Economic Stabilization Act of 1970 as "an affirmative constitutional right, inherent in its capacity as a State,"[212] that defeats legislation enacted under the Commerce Clause. Writing for the Court in a short-lived moment of victory on this issue, Rehnquist explained Congress' inability to impose wage and hour restrictions on states as employers in similarly abstract terms: "We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3."[213] Only in his majority opinion does Rehnquist attempt to flesh out this vague constitutional right through a discussion of the financial consequences to the states of federal guidelines on wages and hours.[214] The effort is less than persuasive, because he concedes that Congress may regulate to "combat a national emergency"[215] but offers no test to measure which operations are "integral" and which situations are emergencies.

Rehnquist's reluctance to formulate tests or to draw lines is an offshoot of his preference for abstract organizing principles. Writing in dissent in *Trimble v.*

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206. *Id.* at 91-106.

207. *Id.* at 108-12.

208. "The Court strikes down the Alabama statute because the State wished to 'characterize prayer as a favored practice.'" *Id.* at 113.

209. *Id.*

210. Nevada v. Hall, 440 U.S. 410, 433 (1979) (Rehnquist, J., dissenting).

211. *Id.* at 439.

212. Fry v. United States, 421 U.S. 542, 553 (1975) (Rehnquist, J., dissenting).

213. National League of Cities v. Usery, 426 U.S. 833, 852 (1976), *overruled by* Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 531 (1985) (Rehnquist, J., dissenting).

214. *Usery*, 426 U.S. at 846-51.

215. *Id.* at 853.

Gordon about the Equal Protection Clause as "one of the majestic generalities of the Constitution,"[216] he offers an interpretation that has become one of the hallmarks of his jurisprudence, his view that the Fourteenth Amendment was intended by the Framers to apply only to classifications based on race or national origin.[217] Rehnquist finds a virtue in his interpretation quite apart from its historical accuracy[218]—its avoidance of any occasion for drawing difficult distinctions. The Court, he argues, has been placed "in the position of Adam in the Garden of Eden"[219] and has succumbed to the temptation to respond to state legislation according to the Justices' own preferences. Rehnquist's description of the Court's conduct, framed as a mixed metaphor, treats the result as a pathology. The Court's decisions "have . . . produced a syndrome wherein this Court seems to regard the Equal Protection Clause as a cat-o'-nine-tails to be kept in the judicial closet as a threat to legislatures which may, in the view of the judiciary, get out of hand and pass 'arbitrary,' 'illogical,' or 'unreasonable' laws."[220] Rehnquist views his own approach, informed by a "central guiding principle"[221] derived from the Framers, as providing both truth and certainty.

The note of certainty is characteristic of Rehnquist's opinions. On those occasions when a line must be draw, he has little difficulty in drawing it. In *Fry*, for example, where he recognizes that his distinction between traditional and non-traditional state activities "would undoubtedly present gray areas to be marked out on a case-by-case basis," he finds the federal statute at issue to be "clearly on the forbidden side of that line."[222] Insisting on a literal reading of a statute that awarded the plaintiff a recovery far in excess of his actual monetary harm, Rehnquist in *Griffin v. Oceanic Contractors, Inc.*[223] acknowledges that in some instances such literalism might conflict with the intent of the drafters. The case before the Court, however, was "not the exceptional case."[224]

Rehnquist also tends to brush aside with the same assurance the practical difficulties that may accompany his resolutions. In two First Amendment cases that involved the issue of a party's right to receive information, he proffered alternate access to that information as a simple solution. Thus, a consumer prevented by a state statute from learning a pharmacy's price for prescription drugs through advertisements was not prevented "from receiving this information

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216. Trimble v. Gordon, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting).

217. *Id.*

218. Race and national origin are "the area of the law in which the Framers obviously meant it to apply." *Id.*

219. *Id.* at 779.

220. *Id.* at 777.

221. *Id.*

222. Fry v. United States, 421 U.S. 542, 558 (1975). Writing about another Rehnquist opinion, Rahdert has identified "an aura of ineluctibility [sic] that is a hallmark of effective judicial technique," although he subsequently finds as well "an occasional 'darkness' . . . that can perhaps be described as the confusion of craftiness with craft." Rahdert, *supra* note 192, at 858, 879.

223. 458 U.S. 564 (1982).

224. *Id.* at 571.

either in person or by phone."[225] And a student prevented from finding a book in a school library because the Board of Education had withdrawn it as "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy"[226] could obtain the book elsewhere: "The books may be borrowed from a public library, read at a university library, purchased at a bookstore, or loaned by a friend."[227] These solutions are unexamined for potential drawbacks such as financial or transportation problems. They are confidently presented as an effective rejoinder to the First Amendment objections of his adversaries.

The note of certainty was present as well when Rehnquist confronted a challenge to his participation in a case that arose during his tenure in the Justice Department. The case, *Laird v. Tatum*,[228] was a suit by opponents of the Vietnam War claiming that a program of military surveillance of political protest groups had a chilling effect on their First Amendment rights. After the Court ruled that the suit failed to raise a justiciable controversy,[229] the petitioners filed a motion, specifically directed to Rehnquist, asking him to recuse himself *nunc pro tunc* because as a government attorney he had testified before a Senate committee against the propriety of the suit, had acquired "intimate knowledge of the evidence," and had spoken publicly about the issues raised by the case.[230]

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225. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 782 (1976) (Rehnquist, J., dissenting).

226. Board of Educ. v. Pico, 457 U.S. 853, 857 (1982).

227. *Id.* at 915 (Rehnquist, J., dissenting).

228. 408 U.S. 1 (1972).

229. *Id.* at 14-15.

230. Laird v. Tatum, 409 U.S. 824, 825 (1972). Testifying as an assistant attorney general before the Senate Subcommittee on Constitutional Rights chaired by Senator Ervin, Rehnquist had responded to Ervin's question concerning the right of the military to conduct surveillance of civilians exercising their First Amendment rights by insisting that no action would lie:

> My only point of disagreement with you is to say whether as in the case of *Tatum v. Laird* that has been pending in the Court of Appeals here in the District of Columbia that an action will lie by private citizens to enjoin the gathering of information by the executive branch where there has been no threat of compulsory process and no pending action against any of those individuals on the part of the Government.

NOMINATIONS OF SUPREME COURT JUSTICES, *supra* note 42, at 534-44. Referring to this statement denying the justiciability of the plaintiffs' case, Senator Kennedy accused Rehnquist of using his position on the Court to secure a political result by judicial means. In response, Rehnquist insisted that his decision to sit on the case was a judicial act and "I ought not to be called upon somewhere else to justify this." *Id.* at 541-42. For a detailed account of this episode and a strong critique of Rehnquist's conduct, see JOHN P. MCKENZIE, THE APPEARANCE OF JUSTICE 207-23 (1974). McKenzie concludes that although some ethical problems confronting Supreme Court Justices may be subtle, "there was nothing subtle about the *Tatum* case and Justice Rehnquist's relationship to it. Try as he might to restate the matter, Rehnquist judged the rights of parties after giving his view that one of the parties had no rights and after working to defeat that party's claim to rights." *Id.* at 222. *See also* Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589 (1987); Warren Weaver, Jr., *Mr. Justice Rehnquist, dissenting*, N.Y. TIMES MAG., October 13, 1974, at 98-

Rehnquist took the apparently unprecedented step of appending to his denial of the motion a memorandum of fifteen pages in which he strongly rejected the petitioners' argument that his presence violated both the federal recusal statute and the American Bar Association's Standards of Judicial Conduct.[231]

In Rehnquist's view, neither his conduct nor his public statements warranted recusal because his Justice Department role was limited to matters of law (his reading of the legal validity of the petitioners' position) rather than direct political action (participation in the litigation itself).[232] The line between law and politics was thus a simple one to locate. Not surprisingly, Rehnquist drew historical support from instances of past Justices, including Jackson, who had heard cases raising issues of which they had prior experience as government attorneys, academics, or judges of other courts, though none of these precedents was comparable to Rehnquist's involvement on behalf of the Nixon administration in *Laird*.[233] Unlike Jackson, who in *Youngstown Sheet & Tube Co.* had sharply distinguished his role as advocate for the executive branch from that of Supreme Court Justice, Rehnquist transformed the issue into an argument for continuity between a Justice's jurisprudential views before joining the Court and subsequent decisionmaking. Evading the factual elements of the challenge raised against him in favor of a more abstract perspective, Rehnquist concluded that "proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias."[234] The point is well taken, but it fails to address the issues in *Laird*, where the complaint is not that a Justice had developed a pre-appointment First Amendment jurisprudence, but rather that specific political activities in the executive branch may preclude neutral judicial resolution of a particular case.

Many of these strands in Rehnquist's jurisprudence come together in one of his best known opinions, his strong dissent in *United Steelworkers of America v. Weber*[235] from the Court's approval of a voluntary affirmative action training program under Title VII of the Civil Rights Act of 1964. Rehnquist, like most Justices, finds his most distinctive voice in dissent, and the fact that in *Weber* he is responding to a majority opinion by Justice Brennan, for many years his opposite number on the Court, seems to sharpen his focus. The dissent opens with a sustained allusion to George Orwell's *Nineteen Eighty-four*.[236] The Court's interpretation of Title VII to permit affirmative action is, Rehnquist asserts,

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231. Rehnquist opened his memorandum by noting that "neither the Court nor any Justice individually appears to have" filed a written response to a motion to recuse in the past. *Laird*, 409 U.S. at 824.

232. *Id.* at 828-29.

233. *Id.* at 831-36. Rehnquist referred to both Jackson's criticism of Black's presence in *Jewell Ridge* and Jackson's own decision to participate in *McGrath v. Kristensen*, a case raising an issue which Jackson had decided, though in the opposite way, as Attorney General. *Id.* at 831-32.

234. *Id.* at 835.

235. 443 U.S. 193, 219 (1979) (Rehnquist, J., dissenting).

236. *Id.*

comparable to the unacknowledged shift in policy that the government of Oceania accomplishes in the middle of a speech which opens by denouncing one enemy and ends by denouncing another: "'[T]he speaker had switched from one line to the other actually in mid-sentence, not only without a pause, but without even breaking the syntax.'"[237] He faults the majority not merely for its inconsistency; the shift, Rehnquist insists, is motivated by the majority's own policy preference. Thus, "the Court behaves much like the Orwellian speaker earlier described, as if it had been handed a note indicating that Title VII would lead to a result unacceptable to the Court if interpreted here as it was in our prior decisions."[238] By invoking *Nineteen Eighty-four* Rehnquist accuses the Court of sinister motives, the willful substitution of its own views for those of Congress in order to hoodwink the nation and achieve a political result. This is more than a critique of Brennan's methodology; it is an assault on the majority's judicial integrity.

From this aggressive opening Rehnquist goes on to offer a more conventional critique as well. As in statutory cases like *Griffin*, Rehnquist argues that Title VII must be read literally, in this case to preclude any preference based on race. He mocks Brennan's appeal to the "spirit" of the statute by accusing the Court of "a *tour de force* reminiscent not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini."[239] For Rehnquist, the language of the statute admits to only one reading and those who disagree are not only wrongheaded but disingenuous. In fact, a Congress determined to preclude affirmative action plans "would be hard pressed to draft language better suited to the task" than that contained in the relevant statutory sections.[240] The tone of certainty extends into the next section of the opinion, where Rehnquist presents, at great length, the legislative history of the statute. Like his reliance on constitutional history in cases such as *Wallace*, his use of legislative history in *Weber* is thorough and detailed. Only a trickster, an escape artist like Houdini, he suggests, could evade the crushing certainty of the floor debates and committee reports.[241]

The *Weber* dissent reflects Rehnquist's characteristic methodology in one additional respect: It distills the majority opinion into a single abstraction—the need to interpret Title VII in harmony with its spirit rather than its letter—and declines to engage the specific concerns voiced by Brennan. The majority worries that a prohibition on voluntary affirmative action plans by private employers would undermine what it sees as the fundamental policy motivating members of Congress in passing Title VII, the improvement of the economic position of minority workers.[242] Rehnquist does not respond to this concern. He recognizes

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237. *Id.* at 220 (quoting GEORGE ORWELL, NINETEEN EIGHTY-FOUR 181-82 (1949)).

238. *Id.* at 221.

239. *Id.* at 222.

240. *Id.* at 226. One of the key sections of the statute, § 703(d), makes it "an unlawful employment practice . . . to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training." *Id.*

241. *Id.* at 231-51.

242. *Id.* at 202.

that the strength of his position rests on the written record rather than on the potential ambiguities of legislative behavior or the human consequences of his interpretation. If he accuses the majority of evasive tactics, the majority might in turn have questioned his determination to read human behavior with the same devotion to literalness that he brings to the written text. Just as *Youngstown Sheet & Tube Co.* illuminates Jackson's willingness to embrace the ambiguities of the political sphere, *Weber* exemplifies Rehnquist's determination to focus his formidable intellectual energies on a single, carefully framed abstraction that can be most successfully subjected to the pressure of history and textual analysis.

C. Chief Justice Rehnquist Citing Justice Jackson

Though the careers of Jackson and Rehnquist crossed for only the sixteen months of Rehnquist's clerkship, their writings have in some ways crossed for the twenty-four years that Rehnquist has served on the Court. Jackson's body of opinions is of course available to Rehnquist as a source of legal precedent and of felicitous observations about the law, and in a limited way Rehnquist has availed himself of both. Yet, despite the shared preferences of Jackson and Rehnquist for a restricted judicial role, for state prerogatives in a federal system, and for public order, Rehnquist has made only occasional use of Jackson's cases to support his own.

Several of Rehnquist's citations to Jackson on substantive issues indicate their shared assumptions about the Court's role and the Constitution. Dissenting in *Furman v. Georgia*,[243] Rehnquist placed Jackson in the august company of Holmes, quoting passages from both Justices[244] to support his view that the Court owes "genuine deference" to state legislation.[245] When the Court struck down a Kentucky statute requiring schools to post the Ten Commandments on classroom walls, Rehnquist closed his dissent with a long passage from Jackson considering "whether it is possible, even if desirable . . . to isolate and cast out of secular education all that some people may reasonably regard as religious instruction."[246] On the issue of statutory interpretation, Rehnquist quoted Jackson's view that in using legislative history the Court should limit itself to committee reports, "which

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243. 408 U.S. 238, 468-69 (1972) (Rehnquist, J., dissenting).

244. Rehnquist quoted the following passage from Jackson: "The use of the due process clause to disable the States in protection of society from crime is quite as dangerous and delicate a use of federal judicial power as to use it to disable them from social or economic experimentation." *Id.* at 469 (quoting Ashcraft v. Tennessee, 322 U.S. 143, 174 (1944) (Jackson, J., dissenting)). The passage from Holmes observes that the Court "should be slow to construe the clause in the Fourteenth Amendment as committing to the Court, with no guide but the Court's own discretion, the validity of whatever laws the States may pass." *Id.* (quoting Baldwin v. Missouri, 281 U.S. 586, 595 (1930) (Holmes, J., dissenting)).

245. *Id.* at 468-69.

246. Stone v. Graham, 449 U.S. 39, 46 (1980) (Rehnquist, J., dissenting) (quoting McCollum v. Board of Educ., 333 U.S. 203, 235-36 (1948) (Jackson, J., concurring)).

presumably are well considered and carefully prepared."[247] There is some irony in Rehnquist's choice of this passage, because Jackson expressed strong skepticism about the value of floor debate,[248] precisely the resource Rehnquist had relied on heavily in his *Weber* dissent five years earlier.[249] Rehnquist had quoted Jackson on legislative history in *Weber* as well, though not the same passage and not for the same point.[250]

There are two issues on which Rehnquist goes beyond such discrete selections from Jackson's canon to acknowledge a stronger linkage. The first is Rehnquist's position that, under the Fourteenth Amendment, the First Amendment applies with lesser force to the states than to the federal government. In *Buckley v. Valeo* he cited the reasoning in dissents by Jackson in *Beauharnais v. Illinois* and by Justice Harlan in *Roth v. United States* to support this view.[251] Two years later Rehnquist made the same point, although this time in a curiously oblique way. Without naming either Jackson or Harlan, he observed in *First National Bank of Boston v. Bellotti* that he shared this reading of the First Amendment "with the two immediately preceding occupants of my seat on the Court, but not with my present colleagues."[252] Rehnquist's reticence in naming his two predecessors suggests ambivalence about claiming a direct line of descent from Jackson, a natural mentor in light of the clerkship and the fact that the *Beauharnais* dissent was written while Rehnquist worked for Jackson.[253] The passage also suggests Rehnquist's

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247. Garcia v. United States, 469 U.S. 70, 76 n.3 (1984) (quoting Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395 (1951) (Jackson, J., concurring)).

248. "[T]o select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions." *Schwegmann Bros.*, 341 U.S. at 396.

249. *Supra* note 241 and accompanying text.

250. Rehnquist quoted Jackson for the proposition that generally legislative history "'is more vague than the statute we are called upon to interpret.'" United Steelworkers of Am. v. Weber, 443 U.S. 193, 230 (1979) (quoting United States v. Public Utilities Comm'n, 345 U.S. 295, 320 (1953) (Jackson, J., concurring)). Rehnquist went on to assert that the legislative history for Title VII is as clear as the statutory language and "irrefutably demonstrates that Congress meant precisely what it said." *Id.* at 230.

251. 424 U.S. 1, 291 (1976) (Rehnquist, J., concurring in part and dissenting in part) (citing Jackson's dissent in Beauharnais v. Illinois, 343 U.S. 250, 288-95 (1952) and Harlan's dissent in Roth v. United States, 354 U.S. 476, 500-03 (1957)).

252. 435 U.S. 765, 823 (1978) (Rehnquist, J., dissenting).

253. For two occasions on which Rehnquist alluded to Jackson's work without naming him, see William H. Rehnquist, *Point, Counterpoint: The Evolution of American Political Philosophy*, 34 VAND. L. REV. 249, 263 (1981) ("what one of my predecessors on the Supreme Court referred to as 'Judicial Supremacy'"); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 694 (1976) ("what have been aptly described as 'majestic generalities'"). For the latter quote, Jackson is identified in a footnote. Rehnquist has also used that phrase for the language of the Fourteenth Amendment twice in opinions without mentioning Jackson. In one instance, Rehnquist used the phrase without indicating that it was quoted from another source. Trimble v. Gordon, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting). A year earlier, he had

disaffection from the other members of the Burger Court, a response that may have been heightened in *Bellotti* because Rehnquist found himself in unusual company—Justice White, who wrote his own dissenting opinion, was joined by Justices Brennan and Marshall.

The case in which Rehnquist draws most heavily on Jackson explores the scope of executive power, and the source is of course Jackson's *Youngstown Sheet & Tube Co.* concurrence, which Rehnquist has described as the closest of the *Youngstown* opinions "to being a 'state paper' of the same order as the best of the Federalist Papers, or of John Marshall's opinions for the Court in the early part of the nineteenth century."[254] In *Dames & Moore v. Regan*, Rehnquist wrote for a strongly unified Court to uphold the President's settlement of private claims against Iran as part of the agreement for the release of American hostages.[255] The opening section of the opinion contains three references to Jackson in as many pages.[256] Rehnquist first supports his general observation that "it is doubtless both futile and perhaps dangerous to find any epigrammatical explanation of how this country has been governed"[257] with Jackson's note of surprise at "'the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves.'"[258] Rehnquist then cites Jackson for a disclaimer of judicial expertise, the view that "we decide difficult cases presented to us by virtue of our commissions, not our competence."[259] Finally, Rehnquist quotes Jackson's skeptical remark on unlimited executive power, that the criticism of George III in the Declaration of Independence "leads me to doubt that [the forefathers] were creating their new Executive in his image."[260] The framework that Rehnquist has constructed from these passages is carefully balanced between a less than omnipotent Executive and a less than

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cited it to the majority opinion in Fay v. New York, 332 U.S. 261, 282 (1947), authored by Jackson. Woodson v. North Carolina, 428 U.S. 280, 324 (1976) (Rehnquist, J., dissenting). Jackson had originally used the phrase in West Virginia State Board of Education v. Barnette, 319 U.S. 624, 639 (1943). When Jackson used the phrase a second time in *Fay*, he did not indicate that he was quoting himself. *Fay*, 332 U.S. at 282.

254. *Robert H. Jackson*, *supra* note 59, at 539. Rehnquist also said that the opinion "has yet to be surpassed in its statesmanlike and lawyerlike analysis of the executive branch of the federal government." *Id.*

255. 453 U.S. 654 (1981). Justice Powell joined all but note six and Justice Stevens all but Part V of Rehnquist's opinion. Stevens wrote an opinion concurring in part, *id.* at 690, and Powell wrote an opinion concurring in part and dissenting in part. *Id.*

256. *Id.* at 660-62.

257. *Id.* at 660.

258. *Id.* (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring)).

259. *Id.* at 661. Rehnquist is paraphrasing, without citation, language from *West Virginia State Board of Education v. Barnett*: "But we act in these matters not by authority of our competence but by force of our commissions." 319 U.S. 624, 640 (1943).

260. *Dames & Moore*, 453 U.S. at 662 (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. at 641 (Jackson, J., concurring)).

omnicompetent Court. This is, Rehnquist suggests, an area in which there is no simple rule to guide the Court toward an easy resolution.

The body of the opinion makes use of Jackson's tripartite scheme to vindicate several varieties of presidential action.[261] The Court found executive orders nullifying attachments on Iranian property and transferring Iranian assets to be valid under the first of Jackson's categories, presidential action undertaken with the authorization of Congress.[262] On the more difficult question of presidential power to settle claims without express statutory authorization, Rehnquist relied on Jackson's second category, the "zone of twilight," where congressional acquiescence in executive conduct may "sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility." [263] Rehnquist carefully edited Jackson's language, removing the original qualifications—sometimes, as a practical matter, if not invite—to assert flatly that acquiescence and related statutes "may be considered to 'invite' 'measures on independent presidential responsibility.'"[264] The difference is slight but telling, because it serves to strengthen presidential authority based on congressional inaction. Rehnquist makes one further adjustment to Jackson's scheme. Quoting Jackson as acknowledging that his three categories were "'a somewhat over-simplified grouping,'"[265] Rehnquist insists on greater flexibility for the Court. Executive conduct, he maintains, belongs not in one of Jackson's three categories but "at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition."[266] It is surprising to see Rehnquist embrace ambiguity, but in the context of executive power he seems more concerned with enlarging the bounds of permissible conduct than with confining the terms of judicial discretion.

Rehnquist also quotes with pleasure some of Jackson's neatly turned comments on the law and the Court. Discussing the discovery process, Rehnquist cites Jackson's caution that "[d]iscovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary."[267] On two occasions Rehnquist invokes Jackson's famous deflation of the Court, that "[w]e are not final because we are infallible, but we are infallible only because we are final."[268] On two other occasions Rehnquist accompanies his shifts in position

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261. *Id.* at 668. For an additional reference to Jackson's views on executive power in *Youngstown Sheet & Tube Co.*, see Rehnquist's opinion for the Court in Morrison v. Olson, 487 U.S. 654, 694 (1988) (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. at 635 (Jackson, J., concurring)).

262. *Dames & Moore*, 453 U.S. at 674.

263. *Youngstown Sheet & Tube Co.*, 343 U.S. at 637.

264. *Dames & Moore*, 453 U.S. at 678.

265. *Id.* at 669 (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. at 635 (Jackson, J., concurring)).

266. *Id.*

267. Upjohn Co. v. United States, 449 U.S. 383, 396 (1981) (quoting Hickman v. Taylor, 329 U.S. 495, 515 (1947) (Jackson, J., concurring)).

268. Brown v. Allen, 344 U.S. 443, 540 (1953), *quoted in* Richmond Newspapers, Inc. v.

with a reference to Jackson's self-mocking admission that as Justice he has abandoned a position previously taken as Attorney General. After noting that "[p]recedent . . . is not lacking for ways by which a judge may recede from a prior opinion that has proven untenable and perhaps misled others,"[269] Jackson listed his predecessors who had extricated themselves from that situation and concluded with a gracious apologia: "If there are other ways of gracefully and good-naturedly surrendering former views to a better considered position, I invoke them all."[270] These passages have in common a self-deprecating quality that seems to appeal to a whimsical strain in Rehnquist that is more often described by others than demonstrated in his own opinions.[271]

Rehnquist's appreciation of Jackson's literary quality reveals itself in his echoing of Jackson's conversational cadence and use of metaphor as well as in occasional allusions to works of literature, a fairly regular custom of Jackson's.[272] A largely self-taught man, Jackson had been introduced to literature by a gifted high school English teacher[273] and carried into his writing both his broad reading and his keen ear.[274] His range of literary allusion was impressive: it included Lord Byron,[275] John Milton,[276] Mark Twain,[277] and Gilbert and Sullivan,[278] as well as traditional proverbs[279] and the writings of William James.[280] Rehnquist's choices tend to be somewhat more limited in range and more obvious in content, including

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Virginia, 448 U.S. 555, 605 (1980) (Rehnquist, J., dissenting) *and* Franks v. Delaware, 438 U.S. 154, 186 (1978) (Rehnquist, J., dissenting).

269. McGrath v. Kristensen, 340 U.S. 162, 177 (1950) (Jackson, J., concurring).

270. *Id.* at 178, *cited with approval in* Marek v. Chesny, 473 U.S. 1, 13 (1985) (Rehnquist, J., concurring) *and* Califano v. Boles, 443 U.S. 282, 294 n.12 (1979).

271. For a discussion of what he calls Rehnquist's "impish irreverence and wit," see BERNARD SCHWARTZ, THE ASCENT OF PRAGMATISM 31-32 (1990). That impishness occasionally includes a taste for practical jokes. *See id.* at 32; Jenkins, *supra* note 55, at 100. *See also* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 269-70, 412-13 (1979). For the appearance of his playful streak in opinion writing, see Corporation Commission of Oklahoma v. Federal Power Commission, 415 U.S. 961 (1974) (opening his dissent from an affirmance on appeal with a limerick).

272. Felix Frankfurter placed Jackson "in what might be called the naturalistic school. He wrote as he talked, and he talked as he felt." *Mr. Justice Jackson*, *supra* note 127, at 938. Bernard Schwartz found Rehnquist to be "the best legal stylist and phrasemaker on the Burger Court, though too much of his literary ability was overshadowed by the extreme positions which it supported." SCHWARTZ, *supra* note 271, at 30.

273. GERHART, *supra* note 6, at 32-33.

274. *See* Sobeloff, *supra* note 127, at xxxi.

275. Everson v. Board of Educ., 330 U.S. 1, 19 (1947) (Jackson, J., dissenting).

276. Craig v. Harney, 331 U.S. 367, 396 (1947) (Jackson, J., dissenting).

277. Securities & Exchange Comm'n v. Chenery Corp., 332 U.S. 194, 214 (1947) (Jackson, J., dissenting).

278. Ray v. Blair, 343 U.S. 214, 232 (1952) (Jackson, J., dissenting).

279. Terminiello v. Chicago, 337 U.S. 1, 14 (1949) (Jackson, J., dissenting).

280. United States v. Ballard, 322 U.S. 78, 93-94 (1944) (Jackson, J., dissenting).

familiar passages from Shakespeare[281] and references to Charles Dickens,[282] George Orwell,[283] and Sir Arthur Conan Doyle.[284] In an unusual echo, both Justices settled on the same biblical metaphor to describe what they considered to be provocative judicial behavior. In his book on the Roosevelt administration's battle with the Court over New Deal legislation, Jackson characterized the granting of injunctions by district courts to block the implementation of federal statutes as a dangerous excess: "District courts were sowing the wind—the Supreme Court would reap the whirlwind."[285] Rehnquist saw the majority's decision approving a voluntary affirmative action plan in *Weber* as another excess that would return to haunt the Court, and he ended his dissent with a similar threat of impending doom: "By going not merely *beyond*, but directly *against* Title VII's language and legislative history, the Court has sown the wind. Later courts will face the impossible task of reaping the whirlwind."[286] In light of the divergent contexts for the two passages, it seems unlikely that the echo was a deliberate one. The passages do, however, reveal that Jackson's ear was the truer; by domesticating the metaphor and integrating it with the doctrine of statutory interpretation, Rehnquist has lost the ominous power that Jackson's version conveys.[287]

III. TWO STUDENTS OF THE COURT

A. Justice Jackson

It is rare for a Supreme Court Justice to write about the Court beyond the

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281. Milkovich v. Lorain Journal Co., 497 U.S. 1, 12 (1990) ("Who steals my purse steals trash."); Dames & Moore v. Regan, 453 U.S. 654, 675 n.7 (1981) ("What's in a name?"). In one instance, Rehnquist quoted a passage from *Measure for Measure* on the difference between act and intention, but the footnote makes clear that the passage had already been identified as relevant by a legal scholar: "As recognized by one commentator, Shakespeare's lines here express sound legal doctrine." United States v. Apfelbaum, 445 U.S. 115, 131 n.13 (1980).

282. Coleman v. Balkcom, 451 U.S. 949, 958 (1981) (Rehnquist, J., dissenting from denial of certiorari) (*Bleak House*); Codispoti v. Pennsylvania, 418 U.S. 506, 531 (1974) (Rehnquist, J., dissenting) (*Bleak House*).

283. *See supra* note 236 and accompanying text for a discussion of Rehnquist's use of *Nineteen Eighty-four* in his dissent in United Steelworkers of America v. Weber, 443 U.S. 193, 219 (1979).

284. *See supra* note 57.

285. ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 123 (reprint 1979) (1941). The biblical metaphor is from *Hosea* 8:7 (King James).

286. *Weber*, 443 U.S. at 255 (Rehnquist, J., dissenting).

287. Rehnquist used the image a second time, in his book on the Court, to end his chapter on the Court's early twentieth century decisions striking down state legislative solutions to problems of the era: "The Court was in the process of sowing a wind, with the whirlwind to be reaped years later." REHNQUIST, *supra* note 31, at 214. The power of the biblical language is again weakened by the addition of two modifying phrases, "in the process" and "years later."

incidental observations that occur naturally in opinions.[288] Jackson is distinguished even among that small company because he wrote twice, from very different perspectives, once shortly before joining the Court and again in the final months of his life. He reports that his first book, *The Struggle for Judicial Supremacy*, "was originally written in odd intervals between arguments in Court as Solicitor General."[289] The vantage point is, however, less that of an engaged advocate than that of a political adviser who suffered with Franklin Roosevelt the Court's assault on the New Deal. The overt theme of the book is the need for judicial self-restraint to maintain balance among the branches of government, but its subtext is a thinly veiled attack on the conservative members of the Court who indulged their own political preferences in striking down congressional legislation.

Jackson's dialectical approach is clear in his account of the way a democracy functions as a continuous process of conflict and resolution. Jackson argues that the elections which resolve clashes between liberals and conservatives are a safety valve for dissident views, and the resulting government policies should be respected by the Court unless they "violate[] clear and explicit terms of the Constitution":[290]

> The device of periodic election was chosen to register and remedy discontents and grievances in time to prevent them from growing into underground or violent revolutionary movements. An election that can turn out one regime and install another is a revolution—a peaceful and lawful revolution. By such method we give flexibility and a measure of popular responsibility to our federated system and maintain a continuity of the government, even though the governors be turned out from time to time.[291]

When the Court intervenes by negating the policy choices of the duly elected governors, it puts at risk this peaceful resolution of political conflict. "The vice of judicial supremacy," Jackson concludes, "as exerted for ninety years in the field of policy, has been its progressive closing of the avenues to peaceful and democratic conciliation of our social and economic conflicts."[292] By ruling New Deal initiatives unconstitutional under such elusive standards as freedom of contract, the judiciary "jeopardized its essential usefulness" in the American system of government.[293]

This theoretical account of the Court's misguided conduct is occasionally punctuated by more pointed criticism of the conservative Justices who struck down the New Deal statutes, a criticism rendered in terms of another dialectic, that

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288. *See, e.g.*, FELIX FRANKFURTER & JAMES LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM (1928); CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES (1936).

289. JACKSON, *supra* note 285, at xix.

290. *Id.* at 319.

291. *Id.* at 316.

292. *Id.* at 321.

293. *Id.* at 322.

of law and politics. Jackson notes the coincidence of hostile decisions and the imminent 1936 election, which "left an uneasy suspicion that the law and politics were not as fully separated as juristic tradition would indicate,"[294] and calls the Court the "bedfellow" of the Republican Party.[295] Court opinions suggest to him that invalidated statutory provisions "were 'obnoxious' not so much to the Constitution as to the judicial sense of what was good for the business community."[296] Although Jackson the theorist asserts that "[t]he Court may be, and usually is, above party politics and personal politics,"[297] his account of the Court's eventual reversal of its positions following Roosevelt's re-election conveys the opposite view, that the conservative Justices were prompted by their own political preferences to reject the policies supported by a democratic majority.

Jackson's second discussion of the Court came over a decade later, after he agreed in March 1954 to deliver the Godkin Lectures at the Harvard Graduate School of Public Administration the following February.[298] According to both his son, William Eldred Jackson, and his former law clerk, E. Barrett Prettyman, Jr., Jackson worked on drafts of his lectures until the day before his death in October 1954.[299] The lectures, published posthumously, thus represent Jackson's final perspective on the Court after thirteen years as a Justice. They also represent a more skeptical view of the Court's ability to protect liberty and a more tolerant view of the Justices' struggle to keep on the right side of what he now calls the "thin . . . line that separates law and politics."[300]

In the first and most polished of the lectures, "The Supreme Court as a Unit of Government," Jackson emphasizes the dependence and passivity of the Court in place of its aggressive claims to supremacy.[301] He notes the Court's reliance on the political branches for its membership, its jurisdictional reach, its enforcement power, and its funding.[302] Further, the Court is "a substantially passive instrument" which can respond only to cases and controversies, and then as a rule only at a slow pace.[303] These weaknesses undermine both its efficacy and its resolve: "I think the Court can never quite escape consciousness of its own infirmities, a psychology which may explain its apparent yielding to expediency, especially during war time."[304] The Court is less to be blamed than pitied for its occasional lapses, because they are in some measure the result of institutional conditions rather than the willful excesses of overreaching Justices.

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294. *Id.* at 124.

295. *Id.* at 177.

296. *Id.* at 164.

297. *Id.* at 287-88.

298. *Foreword* to ROBERT H. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT vii (1955) [hereinafter AMERICAN SYSTEM] .

299. *Id.* at vii-viii.

300. *Id.* at 31.

301. *Id.* at 10.

302. *Id.* at 10-11.

303. *Id.* at 12, 24.

304. *Id.* at 25.

In the final lecture, "The Supreme Court as a Political Institution," Jackson revisits the dialectic of law and politics, but this time his definition of politics is both broader and less sinister, rendering it more difficult to distinguish politics from its opposite number. Borrowing Cardozo's use of politics to mean "policy-making," Jackson concedes that "[a]ny decision that declares the law under which a people must live or which affects the powers of their institutions is in a very real sense political."[305] The Court's constitutional law decisions, especially those allocating power between the branches of government, are thus inherently political and essential to the nation's welfare. They are also, of course, a definitive source of law, and Jackson recognizes the dilemma for a Court which is charged with the duty of resolving political conflicts by means of an inescapably political instrument.

For Jackson, the Court's "political function" is precisely the resolution of a set of opposing principles: to "strive to maintain the great system of balances upon which our free government is based,"[306] balances between the executive and legislative branches, between the federal and state governments, between one state and another, and between the majority and the individual. He is not, however, sanguine that even a Court performing that function capably can ensure liberty. Invoking the lessons of history, he concludes that "I know of no modern instance in which any judiciary has saved a whole people from the great currents of intolerance, passion, usurpation, and tyranny which have threatened liberty and free institutions."[307] It may be that Jackson's experience at Nuremberg as well as his experience on the bench diminished his expectation, suggested in *The Struggle for Judicial Supremacy*, that a properly disciplined Court would "strike more telling blows in the cause of a working democracy."[308] At the close of his career, Jackson continued to advocate judicial self-restraint, but with less hope that the Court alone could find the proper balance between individual liberty and social order.

B. Chief Justice Rehnquist

Like Jackson, Rehnquist has written extensively about the Court, but his work is less theoretical than descriptive, and his intended audience contains principally lay readers rather than legal cognoscenti. Shortly after his elevation to Chief Justice, Rehnquist published a book entitled *The Supreme Court: How It Was, How It Is*, which he saw as "designed to convey to the interested, informed layman, as well as to lawyers who do not specialize in constitutional law, a better understanding of the role of the Supreme Court in American government."[309] If

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305. *Id.* at 53-54.

306. *Id.* at 61.

307. *Id.* at 80.

308. JACKSON, *supra* note 285, at 285.

309. REHNQUIST, *supra* note 31, at 7. Rehnquist has published a second book, GRAND INQUESTS (1992), which describes the impeachment proceedings against Justice Samuel Chase and President Andrew Johnson.

the title hints at the revelations of an insider, the reality is considerably blander. After briefly recounting his own arrival at the Court as Jackson's clerk, Rehnquist offers a historical survey of many of the Court's most important cases from *Marbury v. Madison*[310] through 1953, an ending point carefully chosen "to avoid any discussion of the cases and doctrines in which any of my present colleagues have played a part."[311] The same tact is evident in the book's final section, which describes the Court's procedures in selecting its docket, hearing oral argument, and writing opinions without compromising the secrets of the conference room.

Through most of the book Rehnquist does not discuss his own views about the Court and its Justices, but there are moments when he briefly reveals his opinions. Rehnquist attributes John Marshall's effective leadership of the Court in part to "the power of clear statement," which Rehnquist notes that Marshall possessed "in spades"[312] and which Rehnquist's own style suggests he honors by imitation. Justice Miller's "great gift" was common sense, which pierced both "currently fashionable intellectual dogma" and unquestioned precedent and led him to file a lone dissent later "vindicated by the Court."[313] Even Justice Field's dogmatic and combative nature is redeemed by his "lucid style of writing" and his "indomitable will to persevere in declaring what he thought was correct legal doctrine."[314] Finally, Potter Stewart is singled out from Rehnquist's many colleagues on the Court for praise as "the one least influenced by considerations extraneous to the strictly legal aspects of a case—he was, that is, the quintessential judge."[315] These fragments suggest that Rehnquist's model of an admirable Justice possesses independence of mind even in the face of unified opposition, an intellectual preference for common sense over abstract theories, and a plain style of writing that persuades by its clarity rather than its subtlety. That model surely informs much of Rehnquist's own work on the Court: his solitary and persistent dissents, his avoidance of elaborate theoretical constructs, and his direct and often conversational style.[316]

At a few points in the book Rehnquist does convey more directly his preference for a mildly confrontational relationship between a Justice and the Court. After a chapter that criticizes Franklin Roosevelt's court packing plan for "attempting to restructure the institution itself,"[317] Rehnquist offers a candid defense of Roosevelt's intention. Rescuing the word "pack" from its unfortunate associations, Rehnquist insists that "a president who sets out to pack the Court does nothing more than seek to appoint people to the Court who are sympathetic

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310. 1 Cranch 137 (1803).

311. REHNQUIST, *supra* note 31, at 8.

312. *Id.* at 122.

313. *Id.* at 185. Rehnquist also credits the Taney Court with common sense in commercial matters which "show that Court at its best." *Id.* at 133.

314. *Id.* at 185-86.

315. *Id.* at 256.

316. As an Associate Justice, Rehnquist filed 54 solitary dissents, which is "a Court record." SCHWARTZ, *supra* note 271, at 28.

317. REHNQUIST, *supra* note 31, at 234.

to his political or philosophical principles."[318] Because the President is elected by the entire nation, his choice of Justices is an appropriate reflection of the popular will.[319] Rehnquist tempers the ideological implications of this position by illustrating the imperfect results that Presidents have enjoyed and offering an institutional explanation. In a passage that contains terminology used differently by Jackson, Rehnquist "observ[es] that the Supreme Court is an institution far more dominated by centrifugal forces, pushing toward individuality and independence, than it is by centripetal forces pulling for hierarchical ordering and institutional unity."[320] Any single Justice appointed by an ideological President will be liberated immediately by life tenure and encouraged to strike out independently by the culture of "public scrutiny and professional criticism which sets great store by individual performance, and much less store upon the virtue of being a 'team player.'"[321] A strongly individualistic Justice will in turn be institutionally restrained by the presence of eight other Justices, most selected by a President of a different ideology, and all subject to the same pressure for individual performance.[322]

Rehnquist's frank endorsement of the unmediated expression of individual views by each Justice is in apparent contradiction with one of his consistent themes, the need for a Justice to restrain personal preferences in deciding cases. In the final chapter of his book, Rehnquist returns to that theme without mentioning his prior discussion of judicial individualism. He then counsels against mistaking the collective conscience of the Court for the individual consciences of the Justices. "Many of us," he notes, "feel strongly and deeply about the judgments of our own consciences, but these remain only personal moral judgments until in some way they are given the sanction of supreme law."[323] The two strands in his thought can be harmonized only by assuming that the license he approves for the individual Justice is the freedom to assert not an ideological preference but a judicial interpretation of the Constitution. If that interpretation places its author in solitary disagreement with the rest of the Court, Rehnquist seems to suggest that this is a valid posture, though his chapter on opinion writing omits any discussion of guidelines for dissents. He also declines to indicate how "a disinterested observer" can tell whether the Court is imposing "its own views in the guise of constitutional doctrine," noting evasively that other commentators have attempted to answer that question "with what success I shall leave it to others to determine."[324]

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318. *Id.* at 235.

319. *Id.* at 236.

320. *Id.* at 249. For a discussion of Jackson's use of the terms "centripetal" and "centrifugal," see *infra* notes 331-332 and accompanying text. Jackson also observed, in a characteristic inversion, the influence of the Court on its members: "Why is it that the Court influences appointees more consistently than appointees influence the Court?" JACKSON, *supra* note 285, at vii.

321. REHNQUIST, *supra* note 31, at 250.

322. *Id.* at 250-51.

323. *Id.* at 317.

324. *Id.* at 314.

Rehnquist's study of the Court ends with a celebration and a prescription. He celebrates the Court's increase "in prestige and authority throughout the two centuries of its existence,"[325] from John Marshall's early triumphs through its conflicts with the other branches of government to its present position of public respect. He then defines the Court's function as striking "the proper balance between liberty and authority, between the state and the individual."[326] Rehnquist also makes clear, however, that in striking that balance the Court must give substantial weight to the choices made by the majority through the political branches. He repeats the argument he made in *Furman v. Georgia*,[327] that the Court should err on the side of finding duly enacted statutes constitutional, because striking down a statute replaces the democratic choice of the majority with the anti-majoritarian choice of appointed Justices.[328] Finally, he acknowledges the "good judgment and common sense" of the Justices over two centuries who have met their responsibilities and given shape to the Framers' vision.[329]

C. Two Views of the Court

It is difficult to make a perfect comparison between Jackson's and Rehnquist's commentaries on the Court, because a book directed at a popular audience is understandably different in scope and tone from lectures intended for an academic audience. Further, both authors arrive at similar formulas for the Court's role as an agent of balance between the competing constitutional values of individual liberty and majoritarian social order. Nonetheless, certain areas of contrast do emerge which echo the differences in their jurisprudence.

With his dialectical perspective, Jackson finds conflicting pressures at work not only in the constitutional design but in the shadowy division between law and politics. He sees the Court as an inherently political institution which should exercise self-restraint in its decisionmaking, but he has no expectation that even with the best of intentions it can avoid on occasion crossing the line from acts of pure interpretation to acts of judicial legislation. Jackson's study of history tells him that even a properly restrained Court cannot by itself safeguard the nation if "the political forces at the time" are in opposition.[330] History for Jackson is itself a dialectical process that he describes, in terms borrowed from the constitutional historian James Bryce, as centrifugal and centripetal,[331] conflicting forces which alternately draw people together into a political community and cause them to

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325. *Id.* at 311.

326. *Id.* at 319.

327. 408 U.S. 238, 465 (1972) (Rehnquist, J., dissenting).

328. REHNQUIST, *supra* note 31, at 318. *See Furman*, 408 U.S. at 468 (Rehnquist, J., dissenting).

329. REHNQUIST, *supra* note 31, at 319.

330. AMERICAN SYSTEM, *supra* note 298, at 81.

331. Attorney General Robert Jackson, 150th Anniversary of the Supreme Court, 309 U.S. v, viii (1940).

divide into smaller groups and disperse.[332] When the Court sets itself against the political forces, it is in Jackson's view unlikely to prevail, and he concludes his study of the Court with an assessment of the limitations of the Court: "[I]t is my belief that the attitude of a society and of its organized political forces, rather than its legal machinery, is the controlling force in the character of free institutions."[333]

In such a scheme, each individual Justice must also recognize and deal with the play of opposing forces both inside and outside the Court. Jackson is thus skeptical of the value of dissent, which he considers not an heroic act of self-assertion but "a confession of failure to convince the writer's colleagues."[334] For him, "the true test of a judge is his influence in leading, not in opposing, his court."[335] It is small wonder, then, that the pragmatic Jackson has high praise for John Marshall's opinion in *Marbury v. Madison*, not simply because it established the Court's power of judicial review, but also because it is an exemplar of judicial strategy. By refusing to validate the Federalists' undelivered commission on the grounds that Congress lacked the constitutional power to expand the Court's original jurisdiction, Marshall linked together a victory for the Jeffersonians on the merits with a powerful defeat for them on legal theory. Yet, as Jackson observes, "Jefferson could not defy a decision in his favor; he could make no issue over a legal theory. Judicial supremacy in constitutional interpretation was so snugly anchored in a Jeffersonian victory than it could not well be attacked."[336] This interplay of the legal with the political is for Jackson an inevitable part of the Court's jurisprudence, and he sees no need to isolate doctrine from the play of political forces that allows it to prevail.

Rehnquist's vision of the Court, like his jurisprudence, is monistic, and his book reflects that perspective. Just as constitutional history is a powerful source of doctrine in his opinions, the history of the Court becomes for Rehnquist a sufficient explanation of its present situation. Rehnquist is an enthusiastic amateur

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332. *See* James Bryce, *The Action of Centripetal and Centrifugal Forces on Political Constitutions*, *in* CONSTITUTIONS 96 (1905). Rehnquist also used the terms in his book, though in a different context and without citing either Bryce or Jackson, when he observed that "the Supreme Court is an institution far more dominated by centrifugal forces, pushing toward individuality and independence, than it is by centripetal forces pulling for hierarchical ordering and institutional unity." REHNQUIST, *supra* note 31, at 249. For another use of the term "centripetal," this time by Justice Cardozo to describe the opposing forces in the federal system, see Schecter Poultry Corp. v. United States, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring), *quoted in* Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 310 (1981) (Rehnquist, J., concurring in judgment).

333. AMERICAN SYSTEM, *supra* note 298, at 81.

334. *Id.* at 19.

335. *Id.* Jackson expressed the same ambivalence about the value of dissent in his essay on Justice Brandeis, of whom he wrote: "It is not the number of his dissents, but the quality of his dissenting opinions, that is outstanding." Robert Jackson, *Mr. Justice Brandeis: "Microscope and Telescope," in* AN AUTOBIOGRAPHY OF THE SUPREME COURT 235 (Alan F. Westin ed. 1963). Jackson himself authored 125 dissents. Sobeloff, *supra* note 127, at xxxiv.

336. JACKSON, *supra* note 285, at 27.

historian, and his work reflects his pleasure in informing his readers.[337] It also reflects his tendency to treat history as proceeding in a single direct line rather than dialectically, and he is most comfortable as the chronicler of the Court, moving systematically through his factual narrative without offering much in the way of praise or blame. Although his account of *Youngstown Sheet & Tube Co.* does present the Court as affected by public opinion in its resolution of the case, Rehnquist generally tends to see the work of the Court in terms of its members rather than in terms of its response to external forces. He calls such challenges to the Court as Roosevelt's court packing plan and the impeachment of Justice Samuel Chase "attempts to bully the Supreme Court on the part of the popularly elected branches,"[338] making clear where his sympathies lie. In Rehnquist's view, such challenges have been met and defeated, and "the Court has grown steadily in prestige and authority throughout the two centuries of its existence."[339] The dangers to the Court's prestige and authority that continue to concern him are the internal pressures on individual Justices.[340]

The conflict that Rehnquist presents as the crucial determinant of the Court's institutional success is each Justice's effort to discard political preferences in favor of legal interpretation. Where Jackson finds it problematic to distinguish between law and politics, Rehnquist believes that Justices of good will need only discipline themselves to reject the political choices driven by personal belief in favor of a clearly defined judicial response grounded in the certitude of history and text:

> In the light of the temptations that naturally beset any human being who becomes a judge of the Supreme Court, the truly remarkable fact is not that its members may have on infrequent occasions succumbed to these temptations, but that they have by and large had the good judgment and common sense to rise above them in the overwhelming majority of the cases they have decided.[341]

It is no wonder that Rehnquist has praise for the solitary dissenter like Justice Miller, because the Court should be seeking in every case not a workable consensus but the single correct resolution.[342] Instead of Jackson's pessimistic

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337. Rehnquist's lectures are frequently on historical topics, some of them related to or later incorporated into his books. *See, e.g.*, William H. Rehnquist, *The American Constitutional Experience: Remarks of the Chief Justice*, 54 LA. L. REV. 1161 (1994); William H. Rehnquist, *Thomas Jefferson and his Contemporaries*, 9 J. L. & POL. 595 (1993); William H. Rehnquist, *The Supreme Court: "The First Hundred Years Were the Hardest,"* 42 U. MIAMI L. REV. 475 (1988); William H. Rehnquist, *Remarks of Chief Justice William H. Rehnquist*, 60 TEMP. L. Q. 829 (1987); William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 752 (1986); William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. Rev. 1 (1986); William H. Rehnquist, *Political Battles for Judicial Independence*, 50 WASH. L. REV. 835 (1975).

338. REHNQUIST, *supra* note 31, at 307.

339. *Id.* at 311.

340. *Id.* at 313-14.

341. *Id.* at 319.

342. Rehnquist has asserted that "if dissenting views are strongly held, they should be

vision of a Court vulnerable to the political forces at work in society, Rehnquist offers an optimistic assessment of the Court's future role based on its past record of success. With good judgment and common sense, the Justices will defeat their own lesser selves and continue to strengthen the Court. It is a pleasing prospect, but one that Jackson would most likely have greeted with his characteristic skepticism.

CONCLUSION

It was an accident of history that placed William Rehnquist in the chambers of Robert Jackson when two of the Court's most important twentieth century cases, *Youngstown Sheet & Tube Co.* and *Brown*, appeared on its docket. That accident affords us an unusual opportunity to compare two Justices of conservative views at their point of intersection as Jackson's legal career moved toward its conclusion and Rehnquist's began. Although Jackson and Rehnquist shared conservative positions favoring state over federal power, community order over individual liberty, and judicial deference to legislative bodies, they brought to their decisionmaking significantly disparate perspectives on the transformation of those positions into law.

For Jackson, deciding cases was a dialectical enterprise which required a constant accommodation of opposing principles—of order and liberty, of majoritarian preference and minority right, of law and politics. Determining where to draw the line in each case was never a simple matter; it demanded a careful examination of the facts of each case and a pragmatic assessment of alternative outcomes. Jackson's beliefs, especially after his return to the Court from Nuremberg, were not difficult to ascertain, but his decisions remained difficult to predict. For Rehnquist, deciding cases has always been a straightforward proposition. With his monistic approach, he finds a single controlling principle in each case, generally at a level of abstraction that renders the facts of little interest, and proceeds to an inevitable resolution. Where Jackson was unpredictable, Rehnquist is eminently consistent; where Jackson struggled to see his way through each case, Rehnquist is imperturbably confident of his decision.

The same contrast informs the studies of the Court authored by Jackson and Rehnquist. Although both wrote that the Court's role is to strike a constitutionally valid balance between the opposing forces of order and liberty, their attitudes toward that role reflect their jurisprudential differences. After thirteen years as a Justice, Jackson came to believe that the Court could only struggle with the intractable problem of separating constitutional interpretation from policy preference and that, finally, the Court's best efforts might well be insufficient to preserve liberty in the face of hostile political forces. Writing after fifteen years on the Court, Rehnquist found in the Court's history a generally upward progression in prestige and authority that promised an institution capable of preserving liberty. In Rehnquist's view the principal danger remained the judicial

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voiced." William H. Rehnquist, *"All Discord, Harmony Not Understood": The Performance of the Supreme Court of the United States*, 22 ARIZ. L. REV. 973, 978 (1980).

tendency to interpret the Constitution in light of political preferences rather than the certainties of history and text. Even that danger, however, could be overcome by Justices of sound judgment and common sense who are properly grounded in constitutional history.

These elements are already detectable in the responses of a seasoned Justice and a young law clerk to the complexities of *Youngstown Sheet & Tube Co.* and *Brown*. Jackson's two concurrences, one published and one suppressed, both reveal his candid efforts to find an accommodation between abstract principle and concrete situation, between individual conscience and institutional performance. His career is as aptly reflected in what he withheld as in what he wrote. In Rehnquist's observations of *Youngstown Sheet & Tube Co.* and his *Brown* memo the seeds of his jurisprudence are already present. He assesses the likely result of *Youngstown Sheet & Tube Co.* in terms of the political histories of the Justices, assuming an ideological consistency that his own career illustrates, and he finds a simple solution to the problem of *Brown* by drawing a sharp line between the Justices' imagined preferences and the Court's restricted role. It is not after all surprising that Rehnquist writes about Jackson with detachment. They represent two divergent judicial casts of mind—dialectical and monistic, skeptical and certain, pessimistic and optimistic—which sixteen months together at the Court could not bridge.

SEX, SECTARIANS AND SECULARISTS: CONDOMS AND THE INTERESTS OF CHILDREN

YVONNE A. TAMAYO*

INTRODUCTION

Adolescents.[1] Sex. Condoms. Religion. Some parents are eager to discuss these subjects; many are not. Recently some parents have brought court actions against public schools challenging state acts that they perceive as a threat to their religious beliefs and their right to privacy in raising their teenage children.

This Article explores the status of litigation concerning "condom availability" programs and the context in which that litigation arises. Focusing on federal constitutional issues, it critiques judicial decisions which, while acknowledging the potential harm that AIDS presents to adolescents, nonetheless evaluate the claims of parents opposing condom-accessibility programs and find that privacy-based constitutional interests outweigh state interests in attempting to provide young people with protection from the possibility of deadly infection.

Part I discusses the leading New York and Massachusetts condom cases and their conflicting decisions. Part II examines the meaning of "coercion" in Free Exercise Clause doctrine and considers the operation of coercion in American culture in ways that strongly affect and influence adolescents. Part III examines the complexities presented by the specifically sexual nature of the matter being regulated by the state in condom availability programs. It emphasizes the existence of widespread popular denial of the reality and significance of AIDS as a threat to young people's health and lives. Part IV examines the national discordance existing in the United States among religious and political ideologies contending to determine how, and by whom, control over children should be exercised to serve their "best interests."

I. CONDOM LITIGATION

High schools across the country have begun to implement condom availability programs in an effort to reduce the exposure of adolescents to the deadly AIDS virus through sexual contact. Many of these programs include "opt-out" provisions whereby parents may place the name of their child on a list identifying that child as ineligible to obtain condoms from the school. Some programs, however, do not include "opt-out" provisions. As the number of programs without

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1. Throughout this Article, the terms "adolescents" and "teenagers" will refer to young persons aged twelve to eighteen, the approximate ages of the students in grades seven through twelve for whom the condom availability programs were instituted in Curtis v. School Comm., 652 N.E.2d 580 (Mass. 1995), *cert. denied*, 116 S. Ct. 753 (1996) and Alfonso v. Fernandez, 606 N.Y.S.2d 259 (N.Y. App. Div. 1993).

"opt out" provisions for children of objecting parents increases, so too will the number of lawsuits filed to challenge the states' aggressive measures in providing adolescents broad access to condoms. Increasingly, such actions are being brought by parents of high-school-aged children attending public schools, in an effort to reduce "messages" communicated by schools to students that conflict with their parents' religious principles favoring sexual abstinence.

At the time of this writing, only two state courts have opined on the constitutionality of condom availability in public schools.[2] Those recent opinions, from New York and Massachusetts, are not in agreement, and their rationales and holdings make clear that the condom cases are the product of a highly incendiary debate not likely to be soon resolved. The alarming prevalence of AIDS among adolescents,[3] the ever-increasing influence of religious groups on public policy,[4] and the fact that litigants contesting "condom availability" programs assert rights protected by the First and Fourteenth Amendments to the United States Constitution[5] all assure that an increase in "condom" litigation is imminent.

In February 1991, the New York City Board of Education voted to establish an expanded HIV/AIDS education program in the public high schools of New York City. Each high school was required to adopt a curriculum incorporating lessons on the methods of AIDS prevention.[6] The aspect of the program under attack in *Alfonso v. Fernandez* involved the provision of condoms to students in the seventh through twelfth grades.[7] Under the New York City program, condoms became available to students "for the asking," regardless of parental wishes. Although students were in no way required to participate in the program, the Board decided against an "opt-out" provision because students whose parents disapproved of premarital sexual relations and who nonetheless were sexually active might especially be in need of a place where they could obtain condoms without having to account for any expenditures of funds or without having to identify themselves before they could be given a condom.[8]

The condoms were to be dispensed by trained health professionals only to a student who requested them, and the student was to be given a pamphlet to read in the presence of the person administering the program.[9] Afterwards, the administrator would provide a condom and ask if the student had any questions.[10] The pamphlet read as follows:

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2. *Curtis*, 652 N.E.2d at 580; *Alfonso*, 606 N.Y.S.2d at 259.

3. An estimated 40,000 to 50,000 adolescents are infected annually with HIV. ALAN GUTTMACHER INSTITUTE, SEX AND AMERICA'S TEENAGERS 38 (1994).

4. *See* Joe Klein, *Learning How to Say No: Clinton's New Teen Pregnancy Program Will Counsel Abstinence*, NEWSWEEK, June 13, 1994, at 29.

5. *See Curtis*, 652 N.E.2d at 580; *Alfonso*, 606 N.Y.S.2d at 259.

6. *Alfonso*, 606 N.Y.S.2d at 261.

7. *Id.*

8. *Id.* at 269 (Eiber, J., dissenting).

9. Nick Chiles, *Lines Form for School Condoms; Students Back the Program*, NEWSDAY, Nov. 27, 1991, at 5.

10. *Id.*

RISKS AND BENEFITS OF THE USE AND MISUSE OF CONDOMS:
The only 100 percent effective way to prevent the sexual spread of HIV and other sexually transmitted diseases is not to have sexual intercourse (abstinence). If you do have sexual intercourse of any kind, the only way to help protect yourself is to use a condom.

The main reason a condom may not provide protection is because it is not used correctly. If you use condoms, you can help protect yourself by reading and learning how to use them properly. The person making condoms available in your school can answer questions or can refer you to other people who can give you additional information on condom usage.

There are two reasons a condom may not protect you.
1. It may break.
2. It may slip and leak.

Knowing how to use a condom properly can reduce these risks. If you have additional questions, you can ask the person who is making condoms available in your school.[11]

Parents of various New York City public school students filed suit against the New York City Board of Education[12] challenging the condom program as involving statutory and state and federal constitutional violations.[13] At issue in *Alfonso v. Fernandez*[14] was whether the voluntary condom program was a "health service" requiring parental consent under New York law,[15] and whether the

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11. *Id.*

12. Joseph A. Fernandez, Chancellor of the New York City Board of Education was also named as a defendant in this case.

13. Alfonso v. Fernandez, 584 N.Y.S.2d 406 (N.Y. Sup. Ct. 1992), *rev'd,* 606 N.Y.S.2d 259 (N.Y. App. Div. 1993). The parents alleged that the condom program violated New York law requiring parental consent for the distribution of "health services" to minors; they also asserted violations of their free exercise rights and due process rights to raise their children as they saw fit under the First and Fourteenth Amendments of the Constitution, and under similar state constitutional provisions. *See* N.Y. CONST. art. I, § 3; N.Y. CONST. art. I, § 6; N.Y. PUB. HEALTH LAW § 2504 (McKinney 1993).

14. 584 N.Y.S.2d 406 (N.Y. Sup. Ct. 1992).

15. N.Y. PUB. HEALTH LAW § 2504 (McKinney 1993 & Supp. 1996) dispenses with a common-law parental consent requirement in only six enumerated instances:

> 1. Any person who is eighteen years of age or older, or is the parent of a child or has married, may give effective consent for medical, dental, health and hospital services for himself or herself . . . .
> 2. Any person who has been married or who has borne a child may give effective consent for medical, dental, health and hospital services for his or

condom program infringed on the parents' free exercise rights[16] or their rights to raise their children as they saw fit.[17] The lower court found that although the condom program was "health related," it did not qualify as a "health service" under section 2504 of New York Public Health Law.[18] It also held that because of its voluntary aspect, the condom program did not infringe on the parents' right to raise their children or to teach them the doctrines of their religious beliefs.[19]

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her child.

3. Any person who is pregnant may give effective consent for medical, dental, health and hospital services relating to prenatal care.
4. Medical, dental, health and hospital services may be rendered to persons of any age without the consent of a parent or legal guardian when, in the physician's judgment an emergency exists and the person is in immediate need of medical attention and an attempt to secure consent would result in delay of treatment which would increase the risk to the person's life or health.
5. Where not otherwise already authorized by law to do so, any person in a parental relation to a child as defined in section twenty-one hundred sixty-four of this chapter and, (i) a grandparent, an adult brother or sister, an adult aunt or uncle, any of whom has assumed care of the child and, (ii) an adult who has care of the child and has written authorization to consent from a person in a parental relation to a child as defined in section twenty-one hundred sixty-four of this chapter, may give effective consent for the immunization of a child. However, a person other than one in a parental relation to the child shall not give consent under the subdivision if he or she has reason to believe that a person in parental relation to the child as defined in section twenty-one hundred sixty-four of this chapter objects to the immunization.
6. Anyone who acts in good faith based on the representation by a person that he is eligible to consent pursuant to the terms of this section shall be deemed to have received effective consent.

16. Violations of the following federal and New York State constitutional rights were asserted: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I; and "The free exercise and enjoyment of religious . . . worship, without discrimination or preference, shall forever be allowed in this state to all mankind . . . ." N.Y. CONST. art. I, § 3.

17. "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV. "No person shall be deprived of life, liberty or property without due process of law." N.Y. CONST. art. I, § 6.

The parental liberty interest in directing the upbringing and education of children was first recognized by the United States Supreme Court in Meyer v. Nebraska, 262 U.S. 390 (1923). The Court found that while it had not "attempted to define with exactness the liberty" guaranteed by the Fourteenth Amendment, "without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual . . . to establish a home and bring up children, [and] to worship God according to the dictates of his own conscience . . . ." *Id.* at 399.

18. *Alfonso*, 584 N.Y.S.2d at 409.

19. *Id.* at 410.

Accordingly, the court rejected the plaintiffs' argument that the condom availability program violated their constitutional rights, and it dismissed the plaintiffs' complaint.[20] The parents appealed.

In December 1993, the New York Appellate Division Supreme Court issued the first ruling in the country determining whether a "condom availability" program in public high schools was constitutional.[21] The New York Appellate Division defined the three issues presented in *Alfonso* as: 1) whether the "condom availability" program violated the parents' right to freely exercise their religion[22] under the First Amendment and a similar state constitutional provision; 2) whether the Fourteenth Amendment and state constitutional rights of the parents to raise their children as they deemed fit had been violated;[23] and 3) whether the availability of condoms in the public schools constituted a provision of a "health service" to unemancipated minor children that statutorily required parental consent.[24] On appeal, the School Board prevailed on the free exercise argument, but the remaining two issues were decided in favor of the parents, and the condom program was struck down.[25]

The parents in *Alfonso* prevailed on the state statutory-based claim that the provision of condoms in the schools to minors under the age of eighteen was a "health service" requiring parental consent.[26] The court noted that it found little guidance in determining what type of services or treatment were encompassed by the "health services" law, because neither the statute nor case law define that term.[27] The statute provides: "Any person who is eighteen years of age or older, or is the parent of a child or has married, may give effective consent for *medical, dental, health, and hospital services* for himself or herself . . . ."[28]

The nature of condoms as protective devices, in no way intrusive to the body, could have supported a court finding that provision of condoms was not a "health service" such as the typically invasive medical and health services provided by dentists or hospitals. Indeed, providing a student with a condom and instruction for its usage seems less medically intrusive than treating a student with aspirin. While the latter would seem clearly a delivery of "health services," the former could be regarded as delivery of "health education."[29] If the court had fully

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20. *Id.* at 413-14.

21. Alfonso v. Fernandez, 606 N.Y.S.2d 259 (N.Y. App. Div. 1993).

22. *See supra* note 16. Because the state constitutional claims asserted by the plaintiffs were ignored by the court in its analysis, this Article will focus on the alleged federal constitutional violations.

23. *See supra* note 17.

24. *Alfonso*, 606 N.Y.S.2d at 262.

25. *Id.* at 268. The defendants' appeal to New York's highest court was denied on May 3, 1994. Alfonso v. Fernandez, 637 N.E.2d 279 (N.Y. 1994).

26. *Alfonso*, 606 N.Y.S.2d at 263. *See supra* note 15 for the text of N.Y. PUB. HEALTH LAW § 2504.

27. *Alfonso*, 606 N.Y.S.2d at 263.

28. N.Y. PUB. HEALTH LAW § 2504 (1) (McKinney 1993 & Supp. 1996) (emphasis added).

29. *Alfonso*, 606 N.Y.S.2d at 263. The court distinguished "health education" from "health

explored the legislative intent giving rise to the "health services" statute, it would have found that in New York, no parental consent is needed for some minors to obtain abortions[30] or for all minors to be treated for sexually-transmitted diseases.[31]

Further, minors who are eligible for benefits under certain federally-funded social service programs may obtain contraceptives without parental consent.[32] In fact, the court's identification of condoms as a "health service" produced a set of discordant possibilities: minors could obtain treatment without parental consent for the consequences of unprotected sex, but could not, on their own, obtain condoms that might prevent those consequences. Additionally, financially-disadvantaged minors could obtain condoms without parental consent, but minors not receiving welfare or other federal government benefits would be denied similar access to condoms. Notwithstanding the arguments in favor of a finding that condoms were not intended to be included within the reach of the statutory language requiring parental consent, the court branded the New York City program a "means of disease prevention," and thus a "health service" requiring parental consent.[33]

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services" in the following manner: "The distribution of condoms is not . . . an aspect of education in disease prevention, but rather is a means of disease prevention. Supplying condoms to students upon request has absolutely nothing to do with education, but rather is a health service occurring after the educational phase has ceased." *Id.*

30. *Id.* at 271 (Eiber, J., dissenting). The New York statutes allow some minors to obtain abortions without parental consent as follows:

> Any person who is eighteen years of age or older, or is the parent of a child or has married, may give effective consent for medical, dental, health and hospital services for himself or herself, and the consent of no other person shall be necessary . . . .
>
> Any person who is pregnant may give effective consent for medical, dental, health and hospital services relating to prenatal care.
>
> Medical, dental, health and hospital services may be rendered to persons of any age without the consent of a parent or legal guardian when, in the physician's judgment an emergency exists and the person is in immediate need of medical attention and an attempt to secure consent would result in delay of treatment which would increase the risk to the person's life or health.

N.Y. PUB. HEALTH LAW §§ 2504 (1), (3), (4) (McKinney 1993 & Supp. 1996).

31. N.Y. PUB. HEALTH LAW § 2305 (1993) states: "A licensed physician . . . may . . . treat . . . a person under the age of twenty-one years without the consent or knowledge of the parents or guardian of said person, where such person is infected with a sexually transmissible disease, or has been exposed to infection with a sexually transmitted disease."

32. The Medicaid and Aid to Families with Dependent Children provisions of the Social Security Act require provision of family planning services and supplies to program recipients including sexually active minors. *See* 42 U.S.C. §§ 602(a)(15), 1396d(a)(4)(c) (1994). State laws governing these programs require contraceptives be made available to eligible minors. *See* N.Y. SOC. SERV. LAW § 350(1)(e) (McKinney 1993). Additionally, Title X of the Public Health Service Act dictates that the services provided to minors remain confidential. *See* 42 U.S.C. § 300(a); 42 CFR §§ 59.15, 59.5(a)(4) (1994); *Alfonso*, 606 N.Y.S.2d at 264.

33. *Alfonso*, 606 N.Y.S.2d at 263.

The parents' state and federal constitutional claims were based on assertions that in instituting and carrying out the condom program, the public schools were "bombarding" their children with information about sex and AIDS, and influencing the students to succumb to peer pressure and to engage in premarital sexual activity that was sinful and contrary to their religious beliefs.[34] As a basis for finding a violation of their free exercise rights, the court required the parents to show that the condom program denied them or their children the ability to practice their religion, or otherwise coerced them in the nature of those practices.[35] In its analysis, the court, guided by existing judicial precedent, noted that coercion has been found where one who refuses to participate in a required state activity is sanctioned,[36] is held criminally liable,[37] or is denied a benefit.[38]

The New York court found that participation in the New York City condom availability program was wholly voluntary.[39] Students were in no way required to obtain condoms from the school, and no penalties were imposed for failure to do so.[40] Additionally, a student was given a condom only if he or she requested one, and only upon his or her own individual request would a student receive informational literature on the proper use of condoms.[41] The *Alfonso* court readily determined that the availability of condoms did not in any way prohibit the parents and their children from practicing their religion, and that it did not directly or indirectly compel them to engage in conduct contrary to their religious beliefs.[42] On the basis of these findings, the court denied the parents' free exercise claim.[43]

The plaintiffs prevailed on their claim that the school condom program violated their state and federal constitutional parental liberty rights[44] by encouraging their children to use contraceptives, which trespassed on their right to influence and guide their children's sexual behavior without state interference.[45] In its analysis of whether the condom program violated parental privacy rights, the *Alfonso* court conducted a threshold inquiry examining whether an intrusion into the parent-child relationship had occurred. Without attempting to define the level of interference necessary to constitute a governmental intrusion, the court concluded that the condom program was intrusive because it compelled parents to send their children "into an environment where they had unrestricted access to

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34. *Id.* at 267.

35. *Id.*

36. St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991).

37. Wisconsin v. Yoder, 406 U.S. 205 (1972).

38. Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963).

39. *Alfonso*, 606 N.Y.S.2d at 265.

40. *Id.* at 266.

41. *Id.* at 261.

42. *Id.* at 268.

43. *Id.* at 267.

44. *See supra* notes 16-17.

45. *Alfonso*, 606 N.Y.S.2d at 267.

free contraceptives . . . ."[46] However, the court found a compulsory or coercive state act without any reference to the United States Supreme Court's prior treatment of state compulsion or coercion.[47]

The Supreme Court has established that in determining whether state intrusion has occurred, the state act will be found coercive only when persons are compelled to submit to a mandatory state edict that impedes their right to freedom of religion and provides no alternative options.[48] Specifically, examples of coercion have been found where parents are forced, under threat of criminal sanctions, to send their children to public schools rather than religious schools;[49] to refrain from teaching foreign languages in private schools;[50] or where parents were prohibited from teaching their children in alternative educational environments as required by their religion.[51] In light of the voluntary nature of the *Alfonso* condom program, it is difficult to imagine that the facts in that case could be construed as satisfying the United States Supreme Court's definition of coercion. Nonetheless, the New York City public schools' condom program was found to be coercive, and thus sufficiently intrusive to establish the first aspect of the family privacy standard.[52]

Having determined that the state had intruded on the parents' liberty rights in rearing their children, the court considered a second aspect of the parental liberty, or privacy claim: whether the state could show a compelling interest for the condom program and whether the program, lacking an "opt out" provision, was necessary to meet that interest.[53] The court approached the compelling interest analysis by observing that the absence of the condom program would not cause students difficulty in acquiring condoms. It pointed out that condoms could be legally purchased by minors at stores "next to vitamins and cold remedies," for about "the same price as a slice of pizza," and could also be obtained at federally-funded family planning clinics.[54] Because condoms could be purchased or obtained from sources other than the public schools, the state's provision of free contraceptives in the school setting was deemed not sufficiently compelling to override the perceived intrusion into the familial unit.[55] The court further stated:

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46. *Id.* at 266.

47. The United States Supreme Court has not specifically stated that coercion or compulsion is the standard for establishing the type of interference necessary to show a state violation of family privacy; however, this standard has been utilized by the Court in that it has not proceeded further in its analysis if a state act is not deemed coercive. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

48. *Yoder*, 406 U.S. at 219; *Pierce*, 268 U.S. at 530; *Meyer*, 262 U.S. at 399.

49. *Pierce*, 268 U.S. at 510.

50. *Meyer*, 262 U.S. at 390.

51. *Yoder*, 406 U.S. at 205.

52. Alfonso v. Fernandez, 606 N.Y.S.2d 259, 263 (N.Y. App. Div. 1993).

53. *Id.* at 266.

54. *Id.* at 267.

55. *Id.*

> Students are not just exposed to talk or literature on the subject of sexual behavior; the school offers the means for students to engage in sexual activity at a lower risk of pregnancy and contracting sexually transmitted diseases . . . . We conclude that the policy . . . interfer[es] with parental decision-making in a particularly sensitive area.[56]

The *Alfonso* court ended its consideration of this issue with the observation that the program would have passed constitutional muster if it had allowed parents who were interested in providing "appropriate guidance and discipline" to their children to "opt out" of the program.[57] This dicta seems to express a judicial perception that if parents wish to raise their children "appropriately," they should deny them the option of obtaining condoms in their schools. The language of the court in *Alfonso* is illuminating in that it exposes a judicial aversion to unfettered discourse regarding sexually-related issues, particularly where adolescents are involved. Thus, the opinion of the court echoes the plaintiffs' beliefs that for schools to go beyond "talk and literature" in helping sexually active adolescents protect themselves from deadly disease is, on balance, not as important as upholding the "private" sanctum of the family.

Unlike the New York appellate court decision, the Massachusetts lower court and Supreme Judicial Court rulings in the case *Curtis v. School Committee*[58] support state efforts to combat the exposure of adolescents to HIV, in spite of parental assertions that the state condom availability program violates personal and religious rights. The *Curtis*[59] case commenced on May 22, 1992. Five students and their parents[60] challenged two public schools[61] under the jurisdiction of the School Committee of Falmouth, Massachusetts, which had instituted a condom availability program with no "opt out" provision for students in grades seven through twelve.[62] At Lawrence Junior High School, students could receive condoms free of charge from the school nurse. Prior to obtaining a condom, a student would be counseled and would receive pamphlets providing information about condom use and sexually transmitted diseases.[63] At Falmouth High School, students could either request free condoms from the school nurse or purchase them for $.75 from the condom vending machines in the boys' and girls' restrooms.[64]

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56. *Id.* at 266.

57. *Id.* at 267.

58. 652 N.E.2d 580 (Mass. 1995), *cert. denied*, 116 S. Ct. 753 (1996).

59. Curtis v. School Comm., No. 92-518 (Mass. Sup. Ct. Oct. 8, 1993); Curtis v. School Comm., 652 N.E.2d 580 (Mass. 1995).

60. Brief of Amicus Curiae at 15-16, Curtis v. School Comm., 652 N.E.2d 580 (Mass. 1995).

61. The defendants in *Curtis* were the Falmouth School Committee, the superintendent of the Falmouth public schools, the principal of Falmouth High School, and the principal of the Lawrence Junior High School in Falmouth. *Curtis*, 652 N.E.2d at 580 & n.2.

62. *Id.* at 582.

63. *Id.* at 582-83.

64. *Id.* at 583.

Trained faculty members provided counseling to students who requested it, and informational pamphlets were available in the nurse's office.[65]

The plaintiffs alleged that the condom availability program infringed on family privacy and free exercise rights in violation of the First and Fourteenth Amendments of the United States Constitution.[66] More specifically, they argued that by providing students with sex-related information and access to condoms, the program violated their constitutional right to freely exercise their religion by interfering with their efforts to instill in their children moral beliefs that sex outside of marriage is sinful.[67]

The defendants in *Curtis* moved for summary judgment claiming that the plaintiffs had not shown a reasonable likelihood of proving that the condom availability program violated any of their constitutional or statutory rights.[68] The trial court found that because the condom availability program neither burdened nor coercively interfered with the plaintiffs' privacy rights or with the right to free exercise of religion, the program did not violate the plaintiffs' federal constitutional rights.[69] The lower court thus granted the defendants' motion for summary judgment, and the plaintiffs appealed.[70] The plaintiffs asserted in their appeal that the lower court had erred in its finding that the condom availability program, which lacked an "opt out" provision, did not violate their right to familial privacy and to the free exercise of their religion pursuant to constitutional guarantees.[71] The court began its analysis of the plaintiffs' claims by acknowledging parents' rights to be free from unnecessary governmental intrusion in rearing their children.[72] It noted that inculcation of moral standards, religious beliefs, and elements of good citizenship are aspects of child rearing protected by the Constitution from unnecessary intrusion.[73] It also highlighted the Supreme Court's appreciation and zealous protection of parents' fundamental liberty

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65. *Id.*

66. *Id.* at 582. The plaintiffs also asserted claims under MASS. GEN. L. ch. 274, § 3 (1994) (prohibiting the counseling of a felony), MASS. GEN. L. ch. 119, § 51A (requiring school administrators to report incidents of sexual abuse to the Department of Social Services), and MASS. GEN. L. ch. 71, § 30 (requiring public school teachers to impress chastity on the minds of children). The plaintiffs further asserted that all of the above-stated violations resulted in a deprivation of their civil rights under 42 U.S.C. § 1983 (1994) and MASS. GEN. L. ch. 12, § 111. All of plaintiff's claims were denied. *Curtis*, 652 N.E.2d at 582 & n.3.

67. *Curtis*, 652 N.E.2d at 588.

68. *Id.* at 582.

69. *Id.*

70. The plaintiffs filed, and the court granted, an application for direct appellate review by the Supreme Judicial Court of Massachusetts. *Id.*

71. On appeal, the plaintiffs did not argue the claims based on alleged violations of Massachusetts statutory and constitutional law. *Id.*

72. *Id.* at 585.

73. *Id.* (citing Wisconsin v. Yoder, 406 U.S. 205, 232-33 (1972); Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 401 (1923)).

interest in raising their children:

> The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and the upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.[74]

The plaintiffs first argued that the condom program violated their substantive due process rights under the Fourteenth Amendment to direct and control the education of their children within the zone of familial privacy.[75] This claim rested on the assertion that the program placed their children within the compulsory setting of public schools, which provided their children unrestricted access to condoms without parental input.[76]

The *Curtis* court set forth the threshold inquiry in the familial privacy claim: whether parents were burdened by the state in their right to educate their children.[77] In this inquiry, the court acknowledged that the burden required for such an unconstitutional interference must constitute coercion or "compulsion" by the state.[78] In its analysis, the court considered the facts surrounding the availability of condoms in the Falmouth schools. The program required no classroom participation of students.[79] Instead, condoms were made available in the nurse's office to junior high school students who requested them, and were also made available to high school students in vending machines in the boys' and girls' bathrooms.[80] The students were not required to obtain the condoms, to read the instructional literature, or to participate in counseling regarding their use.[81] They were free to decline to participate in the program, and no penalty would ensue because of failure to obtain condoms from the school.[82] Further, the parents were free to impart moral and religious teachings to their children and were equally unencumbered in instructing their children not to participate in the condom program.[83]

Unlike the *Alfonso* court, the court in *Curtis* looked to legal precedent in

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74. *Id.* at 585 (quoting *Yoder*, 406 U.S. at 232); *see also* Ginsberg v. New York, 390 U.S. 629, 639 (1968).

75. *Curtis*, 652 N.E.2d at 584.

76. *Id.*

77. *Id.* at 585.

78. *Id.* (citing Doe v. Irwin, 615 F.2d 1162, 1168 (6th Cir. 1980), *cert. denied*, 449 U.S. 829 (1980)). *See also Yoder*, 406 U.S. at 205 (compulsory school attendance law violated Amish parents' right to direct religious upbringing of children); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (law requiring public school attendance and prohibiting attendance at private parochial schools violated parental liberties); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (law prohibiting teaching of foreign languages to school children violated parental liberties).

79. *Curtis*, 652 N.E.2d at 586.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

determining the type of factual scenario necessary to establish the requisite coercive state action. It found that coercion exists where the governmental act in question is mandatory, and provides no alternative option for the party being burdened by the state requirement.[84] Considering past judicial findings of coercive government acts, the court noted that the United States Supreme Court had found that laws proscribing the education of children other than at public school[85] and laws prohibiting the teaching of foreign languages to school children[86] were coercive. The court in *Curtis* found, by reference to precedent, that the plaintiffs had not met a threshold requirement of establishing state coercion interfering with their personal liberty and familial privacy interests.[87] As a result, the court did not inquire into the compelling nature of the state's interests in implementing the condom program.[88]

In order to prevail on their free exercise claim, the parents had to show that the condom program imposed a substantial burden on the exercise of their religion.[89] To establish the necessary burden, the parents were required to demonstrate, as in the privacy claim, that the burden was coercive or compulsory in nature.[90]

The court displayed a sensitivity to the plaintiffs' claims by noting that the voluntary condom distribution program might offend the religious sensibilities of the plaintiffs. However, it also recognized that parents have no right to tailor public school programs to meet their individual preferences.[91] Like the *Alfonso* court, the Massachusetts Supreme Judicial Court pointed to the voluntary nature of the condom program in that there was no requirement that any student participate in the program.[92] As a result, it held that mere exposure of adolescents at public schools to "offensive" programs, without more, did not violate the Free Exercise Clause.[93] Treating the issue fairly summarily, the court denied the free exercise claim and upheld the condom availability program.[94]

The outcomes of the New York and Massachusetts condom cases illustrate the discordance existing in the present American and global climates that is fueled by conflicting economic interests, faith-based "truths," life-threatening sexually-transmitted diseases, and judicial attempts to maintain order and to foster the spiritual and physical vitality of children in need of protection. The federal constitutional claims raised in both the New York and Massachusetts cases arise in that complex climate. Because this climate and culture are in many ways

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84. *Id.* at 585-87.

85. *Id.* at 585 (citing Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925)).

86. *Id.* at 585-86 (citing Meyer v. Nebraska, 262 U.S. 390, 399-401 (1923)).

87. *Id.* at 586-87.

88. *Id.* at 583.

89. *Id.* at 587.

90. *Id.*

91. *Id.* at 589 (citing Epperson v. Arkansas, 393 U.S. 97, 106 (1968)).

92. *Id.*

93. *Id.*

94. *Id.*

different from that which existed a generation ago,[95] constitutional issues must be decided with an eye to both present context and history.

The opinions of both the New York and Massachusetts courts are disappointing in their myopic treatments of the constitutional issues before them. The *Alfonso* court could certainly have been respectful of precedent while upholding a voluntary and non-coercive governmental program with the potential for safeguarding the lives of adolescents; but it did not produce such a decision. The language of the *Alfonso* court suggests that in addition to the stated bases for its rationale, perhaps the court, like many parents, could not bring itself to peel back the layers of shame and guilt[96] inherent in sexual taboos surrounding AIDS in order to face the threat of that disease and act in a responsible manner. The court's allocation of the issue to the "private" realm of the family, its refusal to confront the compelling nature of the AIDS epidemic, and the need for a strong public response by state government, all support parental reproduction of shame and guilt.

Although the *Curtis* court upheld the condom availability program, it resembled the *Alfonso* court in its limited examination of the notion of coercion. Both courts employed analyses relying on conventional application of legal doctrine and ignored important cultural pressures contributing to the coercion of adolescents. Perhaps this is because utilization of the latter method of analysis would have forced the courts to put aside their squeamishness regarding the "particularly sensitive area"[97] of sex and adolescents. This they could not, or would not, do. As a result, their opinions do not provide much needed guidance for resolving future conflicts over when, and how, the state may interfere with parental rights in order to foster the well-being of children. An examination of the realities of present-day coercion might have led the state courts toward more promising analyses.

II. SECTARIANISM, SECULARISM AND SEX EDUCATION

Commentators on Free Exercise and Establishment Clause doctrine sometimes characterize Church and State issues as arising from conflicts of "secularists"[98] and

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95. See the cartoon *Szep's View*, depicting the framers of the Constitution considering whether to include the right to condoms in high schools. Paul Szep, *Szep's View*, BOSTON GLOBE, July 21, 1995, at 16. For an insightful discussion on postmodernist culture, see Marie Ashe, *"Bad Mothers," "Good Lawyers," and "Legal Ethics,"* 81 GEO. L.J. 2533 (1993).

96. *See* Kate N. Day, *The Moral Confusion of Affirmative Action Jurisprudence or When Will We Learn to Bear the Shame of Guilt?*, 16 VT. L. REV. 777 (1992).

97. Alfonso v. Fernandez, 606 N.Y.S.2d 259, 266 (N.Y. App. Div. 1993).

98. The terms "secularism," "humanism," and "secular humanism" are often used interchangeably in the discursive realm. For an insightful discussion on the meanings of each of these terms, see Mary Harter Mitchell, *Secularism in Public Education: The Constitutional Issues*, 67 B.U. L. REV. 603, 616-27. *See also* JOHN W. WHITEHEAD, THE SEPARATE ILLUSION: A LAWYER EXAMINES THE FIRST AMENDMENT (1977); JOHN W. WHITEHEAD, THE SECOND AMERICAN REVOLUTION 53-123 (1982).

"sectarians."[99] These conflicts have become increasingly visible in recent years.[100] The parents' claims in the condom struggle present a window through which to view the larger, more vociferous battle underway and gaining intensity in the country, involving multiple conflicts among secularists and sectarians about the control of children's minds and bodies.

During the 1980s, some Christian groups advanced claims that public schools are promoting the ideology of humanism, which violates the separation of Church and State protected by the Establishment Clause of the First Amendment of the Constitution.[101] Essentially, these claims argued that "secular humanism" involves a level of religion and that public schools' endorsements of secular humanism amounted to a favoring of one religion over another.[102] "Humanism" has been defined by its advocates as "[a]n ethical process through which we can all move, above and beyond the divisive particulars, heroic personalities, dogmatic creeds, and ritual customs of past religions or their mere negation."[103] It has also been defined as "a philosophical, scientific, and ethical viewpoint that involves a commitment to free inquiry, to the use of science to explain nature, and to the use of reason and critical intelligence to solve human problems."[104]

One Christian leader has recently issued an all-encompassing denunciation asserting that "[m]ost of the evils in the world today can be traced to humanism."[105] Others have specifically enumerated premarital sex, drugs, rock music, declining S.A.T. scores, easy divorce, and materialism as harms caused by this ideology.[106] Humanists have additionally been accused of attempting to control the public schools, of instituting a curriculum that is anti-God, anti-moral, anti-family, anti-free enterprise, and anti-American.[107] Conversely, humanists, secularists or other "non-fundamentalists" have charged religion with engaging in

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99. *See* Sanford Levinson, *Some Reflections on Multiculturalism, "Equal Concern and Respect," and the Establishment Clause of the First Amendment*, 27 U. RICH. L. REV. 989 (1993).

100. *Id.*

101. The First Amendment provides, in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I. *See also* HOMER DUNCAN, SECULAR HUMANISM: THE MOST DANGEROUS RELIGION IN AMERICA 52-63, 77-95 (1979) (with introduction by Senator Jesse Helms); TIM LAHAYE, THE BATTLE FOR THE FAMILY 87-103 (1982); TIM LAHAYE, THE BATTLE FOR THE MIND 141-79 (1980); TIM LAHAYE, THE BATTLE FOR THE PUBLIC SCHOOLS (1983).

102. *See infra* note 107 and accompanying text.

103. *Humanist Manifesto II*, THE HUMANIST, Sept.-Oct. 1973, at 4, 5.

104. P. Kurtz, *Who are the Secular Humanists?*, 2 FREE INQUIRY 1 (1981).

105. LAHAYE, THE BATTLE FOR THE MIND, *supra* note 101, at 9.

106. *See* JOHN W. WHITEHEAD, THE SECOND AMERICAN REVOLUTION (1982).

107. *See* LAHAYE, THE BATTLE FOR THE MIND, *supra* note 101, at 57-83. Also consider the comments of Jennie Wilson, a Christian supporter of the parents who sued the Hawkins County School Board over the alleged "anti-Christian" content of textbooks in Mozert v. Hawkins County Board of Education, 827 F.2d 1058 (6th Cir. 1987), found in STEPHEN BATES, BATTLEGROUND: ONE MOTHER'S CRUSADE, THE RELIGIOUS RIGHT, AND THE STRUGGLE FOR CONTROL OF OUR CLASSROOMS 22-23 (1993).

dogmatism, intolerance, repression and anti-intellectualism.[108]

The differences between sectarians and humanists evidenced in the condom cases are very deep. Even if sectarian parents and the school boards they perceive as "secular-humanist" were to agree on how best to keep teenagers safe from AIDS, the presentation of the information necessary to achieve the desired result remains a source of heated controversy. Many parents assert that Biblical teachings, and thus "morality," are absolute; therefore, any discussion of condoms which might cause adolescents to engage in critical assessment of alternative behavioral choices would constitute an affront to and would be irreconcilable with the religious truths handed down to their children.

These parental perspectives were evident in both *Alfonso*[109] and *Curtis*. In *Curtis*, one plaintiff/mother enunciated the harm that the availability of condoms and the related information provided by the public school caused to her family as follows:

> Due to the instruction my son and niece have received at school concerning condoms and sexual activity, they now perceive our views on religion and sex as old-fashioned and openly question our religious beliefs. . . . I am concerned that they may not take the Bible, its commandments and the Word of God as seriously as we have taught them to, and [will] doubt or question the validity of our beliefs.[110]

Fifteen-year-old Daniel, also a plaintiff in the *Curtis* lawsuit, echoed his mother's concerns: "This new policy has . . . caused problems in my relationship with my parents. They think I may be starting to be more sexually active and do not trust me now as much as they did before the condoms were available."[111] These sentiments make clear that the potential for inquisitive or critical thinking challenges the "absolute truths" of religious dogma, and is therefore objectionable to the plaintiffs in the condom cases.

Another indication of the plaintiffs' embrace of "absoluteness" is evident in their search for guidelines guaranteeing desired results. Thus, the plaintiffs in *Curtis* asserted that condoms are unreliable, that condoms are an ineffective means of protection against HIV and potentially fatal sexually transmitted diseases, and that for those reasons they should not be made available to adolescents.[112] In support of this argument, the plaintiffs referred to a medical report released in 1993, containing information that the Food and Drug Administration tested and found fifty broken condoms per one thousand condoms, a rate exceeding the

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108. *See* CORLISS LAMONT, THE PHILOSOPHY OF HUMANISM (6th ed. 1982).

109. *See* Alfonso v. Fernandez, 606 N.Y.S.2d 259, 267 (N.Y. App. Div. 1993) (parents' claims of coercion).

110. Affidavit of Nancy MacLone, Brief of Appellants, vol. 1, joint app. at 72-73, Curtis v. School Comm., 652 N.E.2d 580 (Mass. 1995).

111. Affidavit of Daniel MacLone, Brief of Appellants, vol. 1, joint app. at 69, Curtis v. School Comm., 652 N.E.2d 580 (Mass. 1995).

112. Brief of Appellants at 8, Curtis v. School Comm., 652 N.E.2d 580 (Mass. 1995).

FDA's minimum safety standard of four breaks per one thousand condoms.[113]

It is obviously not desirable for condoms, in any percentage, to exhibit defects. However, assuming arguendo the plaintiffs' assertions regarding the defective nature of the number of condoms tested, it remains the case that in *Alfonso* the Surgeon General of the United States was cited for the statement that condoms are the best protection, other than abstinence, against the sexual transmission of HIV.[114] The plaintiffs in the condom cases, however, demand "absolutisms;" they require bright-line distinctions between good and bad, right and wrong, effective and ineffective. Advocating and tolerating only abstinence as the best protection, they cannot tolerate and in fact do condemn condoms, the "second best" form of protection, refusing to see it as better than some other alternatives, such as unprotected sex.

The intensity of the division between secularists and sectarians in the condom cases is not surprising. More striking, however, is the discord existing among individual religious sects over the public school condom programs. This disagreement was clearly evidenced in the *Curtis* litigation. Briefs filed in that case expose the lack of ideological harmony among religious groups. The plaintiffs in *Curtis* were represented in part by legal counsel for The American Center for Law and Justice, a group founded by the Christian evangelist Pat Robertson,[115] and the Rutherford Institute, a "religious freedom advocacy" group.[116] The American Jewish Congress and the Unitarian Universalist Association, however, filed amicus briefs in support of the Falmouth School Board.[117] In opposition to the parents' claims, those religious organizations vehemently objected to the claims that the condom programs burdened religious freedom, set forth legal arguments promoting the constitutional protection of religious freedom through acceptance of the public school condom program, and urged the court to adopt their vision of the proper means for fostering "a thriving of religious minorities in a pluralistic environment."[118]

The divisions apparent in *Curtis* reflect a contemporary American society within which numerous groups espouse different and seemingly irreconcilable ideologies affected by religion, politics, and economics, regarding the collective concern of children being "at risk" and the need to protect them. These divisions have been met by mechanical application of traditional Free Exercise Clause doctrine such as has been performed by the *Alfonso* and *Curtis* courts. The limits and failures of the courts' approaches can be illustrated by examining their treatment of the notion of coercion. Their approach to the coercion inquiry is simplistic, nostalgic, and unhelpful because of its unwillingness to recognize the

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113. *Id.* at 9 n.13.

114. Alfonso v. Fernandez, 606 N.Y.S.2d 259, 263 (N.Y. App. Div. 1993).

115. Cathy L. Grossman, *Airline's Stance on Religious Expression Causes Lots of Turbulence*, DET. NEWS, Apr. 6, 1995, at D6.

116. Debra J. Saunders, *Who Can Decide, Who Can't*, S.F. CHRON., July 31, 1995, at A19.

117. Brief of Amici Curiae, American Jewish Congress and Unitarian Universalist Association, Curtis v. School Comm., 652 N.E.2d 580 (Mass. 1995).

118. *Id.*

changing realities of contemporary culture.

Both advocates and opponents of various forms of sex education in the public schools are concerned with an array of harms that threaten the well-being of adolescents. However, they are in disagreement about how to prevent these harms. One opponent of sex education has argued: "The sex educators have either a mental block . . . or, for some reason, cannot see that their sex programs are largely responsible for the (1) pregnancies, (2) abortions, (3) prostitution, (4) perversion, (5) suicides and (6) psychological as well as physical venereal diseases that are epidemic in today's youths."[119] The "sex educators," including advocates of condom availability programs who perceive a state interest in preventing such harms, argue that the lack of such programs are contributing to the feared harms.

The plaintiffs in the condom litigation have argued that the state, through condom availability programs, coerce their children by "bombarding" them with objectionable messages condoning sexual activity. The *Alfonso* plaintiffs alleged that their children were "bombarded" with information regarding the condom program, which could cause them to succumb to peer pressure to engage in sex.[120] The "bombardment" was asserted to arise when the schools established health resource rooms where trained professionals dispensed condoms to students who requested them, and when, upon receiving a condom, students were given personal health guidance counseling involving their proper use and the consequences of their misuse.[121] In this process of providing condoms, a student's voluntary activity and initiative are essential. To obtain a condom, a student must, on his or her own volition, travel into an area of a school building set aside specifically for the distribution of condoms, voluntarily request a condom, and only then receive counseling on its proper use.[122] It is thus very difficult to understand how this seemingly autonomously-acting student can be deemed to have been "bombarded" by any aspect of the condom program.

A much clearer instance of children's exposure to bombardment by sexual images and information may be found in young people's ordinary daily activities: watching television and movies, listening to ubiquitous rap and rock music lyrics, and utilizing the Internet.[123] A child needs only to inadvertently access one of

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119. DEBRA W. HAFFNER, M.P.H. & DIANE DE MAURO, PH.D., WINNING THE BATTLE: DEVELOPING SUPPORT FOR SEXUALITY AND HIV/AIDS EDUCATION (Sex Information and Education Council of the U.S. ed. 1990) (quoting MELVIN ANCHELL, KILLERS OF CHILDREN (1988)).

120. Alfonso v. Fernandez, 606 N.Y.S.2d 259, 267 (N.Y. App. Div. 1993).

121. *Id.* at 261.

122. *Id.*

123. Despite the political rhetoric, it is unlikely that adolescents' exposure to popular culture will be restricted by government or the private sector. America's reluctance to censor expression, or to miss out on a marketing advantage, sustains the ever-broadening "marketplace" for teenagers. Richard Lacyo, *Violent Reaction*, TIME, June 12, 1995, at 25-30. Further, the images and experiences available to teenagers are becoming more realistic. Soon teenagers with access to the Internet may have 3-D experiences using Virtual Reality Modeling Language, a new technology enabling them to "virtually" go to the mall and to download rock videos. Michael Meyer, *Surfing the Internet in 3-D*, NEWSWEEK, May 15, 1995, at 68.

various on-line services through the Internet on his or her home computer to find sadomasochism, bestiality, and pornography, which are regarded as immoral and highly objectionable to most parents.[124] Movies and television also provide a deluge of material providing children with numerous examples of sexual relations conducted outside of the mainstream heterosexual marital forum. Today's typical viewer sees about ten thousand scenes of suggested sexual intercourse, sexual comment, or innuendo during one year of average viewing, and seven out of eight acts of intercourse on prime time are extramarital.[125] Similarly, the American movie industry is consistently and legitimately accused of peddling glamorized images of "irresponsible sex" to children and adolescents.[126]

In addition to the proliferation of media messages concerning sexual activity, drastic changes in the structure of the family that also expose children to non-traditional sexual relationships have taken place during the past twenty years. The percentage of children living in single-parent households doubled from 1970 to 1989, at which time sixteen million children lived in single-parent households, and only one-quarter to one-half of all children born today will live with both of their parents throughout their childhood.[127] As a result, many children do not experience the benefit of parental supervision during much of the time when they are not in school. As Justice Eiber noted while dissenting from the three-to-two majority opinion in *Alfonso*, many children lack interested parents or have no parents available to provide guidance and discipline and to urge their adolescent children to abstain from sex until marriage.[128]

Notwithstanding parents' claims of coercion by the state, the reality is that modern technological and social constructs provide ready access to sex-themed messages of infinite variety, and those forces will not "leave alone" young people, many of whom have no consistent parental influence to guide them in making important personal decisions. These forces are in fact coercive of children in the most meaningful sense—they are informative, instructive, persuasive and

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124. Marty Rimm, *Marketing Pornography on the Information Superhighway*, 83 GEO. L.J. 1849 n.5 (1995). For a general discussion of the availability of highly graphic sexual materials available to children on computers, see Stephen Levy, *No Place For Kids?*, NEWSWEEK, July 3, 1995, at 47.

125. Jim Impoco & Monika Guttman, *Hollywood: Right Face Under Seige, Filmmakers and T.V. Bosses Become More Family Friendly*, U.S. NEWS & WORLD REPORT, May 15, 1995, at 66 (citing studies by Robert Lichter, co-director of the Center for Media and Public Affairs).

126. For a recent example of the perceived power of movies to influence the minds of children, see Senate Majority Leader Bob Dole's angry comments regarding Hollywood's poisoning of the "minds of our young people . . . with destructive messages of casual violence and even more casual sex." *Id.* In his State of the Union address, President Clinton condemned the entertainment industry for "incessant, repetitive, mindless violence and irresponsible conduct." *Id.*

127. *See* NATIONAL COMMISSION ON CHILDREN, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES 17-23 (1991); Jerry Adler et al., *Kids Growing Up Scared*, NEWSWEEK, Jan. 10, 1994, at 43.

128. Alfonso v. Fernandez, 606 N.Y.S.2d 259, 275 (N.Y. App. Div. 1993).

seductive. They bombard with much greater power and effectiveness[129] than can the simple presentation of sex education materials by a nurse in an office of the public high school. It is therefore only by utterly ignoring the reality of cultural coercion and bombardment that one could view public school condom programs as bombarding and coercive. In fact, the schools, through the condom programs, offer resistance to the powerful coercions exercised by large social forces.

In examining the claims relating to state coercion, the courts in New York and Massachusetts have failed to account for the cultural context in which those cases arose. Instead, they have limited themselves to reiterating legal doctrine that developed in very different contexts. *Wisconsin v. Yoder*[130] is one of the leading Free Exercise Clause cases considered by the New York[131] and Massachusetts courts[132] in their review of their respective states' condom programs. Like the Amish parents in *Yoder*, the plaintiffs in the condom cases argued that they should not be subject to state requirements which compel or coerce the exposure of their children to anti-religious messages and activities.[133] In *Yoder*, parents and their children who were members of the Old Order Amish and the Conservative Amish Mennonite Church objected to their children being required to attend school beyond the eighth grade and asserted violations by the state over their "free exercise of religion" rights.[134] Life in a separated agrarian community was the keystone of the Amish faith and the Amish argued that attendance at a public school would expose their children, during the critical adolescent years, to higher education that might instill into adolescents values which the Amish rejected as alienating man from God.[135] Testimony established that Amish groups separated themselves from the world, and attempted to shield their children from all worldly influences. If forced to attend public or private school, the children would have had either to abandon their religious beliefs and be assimilated into society at large, or to migrate to a more religiously-tolerant region.[136]

Pursuant to its free exercise inquiry, the Court found that the state requirement of compulsory school attendance to age sixteen for the Amish children posed a threat of undermining the Amish community and religious practice, and that the parental decisions to remove their children from the public school system after completion of the eighth grade were not likely to jeopardize the health or safety of the Amish children.[137] Further, the state did not prove its own interest of the "highest order" in compelling the Amish children to attend public high school,

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129. *See supra* notes 123-27.

130. 406 U.S. 205 (1972).

131. Alfonso v. Fernandez, 584 N.Y.S.2d 406, 409 (N.Y. Sup. Ct. 1992), *rev'd*, 606 N.Y.S.2d 259, (N.Y. App. Div. 1993).

132. Curtis v. School Comm., 652 N.E.2d 580, 584 (Mass. 1995).

133. *Id.* at 587; *Alfonso*, 606 N.Y.S.2d at 267.

134. *Yoder*, 406 U.S. at 209. Under Wisconsin law, the children were required to attend school until they reached the age of sixteen. *Id.* at 207.

135. *Id.* at 211-12.

136. *Id.* at 218.

137. *Id.* at 232-35.

given that the alternative education provided within the Amish community appeared to be as good as, or better than, public education.[138]

In *Yoder*, the Court, in its evaluation of constitutional issues, considered the public policy concerns of allowing the Amish children to forego public high school education. The Amish had excellent records as law-abiding and generally self-sufficient members of society.[139] The Amish community was found to be a highly successful social unit within society, its members productive persons who rejected public welfare benefits.[140] The Court pointed out, favorably, that the Amish group in question had never been known to commit crimes, and that none were unemployed.[141]

The findings made by the Court concerning the Amish established a compelling argument that their religious community could survive only if it was allowed to educate its children free of governmental interference. Not only would the state action cause an infringement of the parents' constitutional rights, it would also precipitate the extinction of a religious community. This consideration clearly influenced the Court in its decision to foster religious pluralism by favoring the claims of the Amish. Further, although some of the religious practices of the Amish may have seemed different and "other" to a majority, the consequences of those practices were found to be appealing and desirable. The Amish were perceived to have attained goals and exemplified virtues that most Americans respect. It was in that cultural context that the Supreme Court found coercive state action in Wisconsin's requirement of high school education for Amish children.[142]

The applicability of *Yoder* to the condom cases, however, is highly questionable. The world has changed greatly since *Yoder* was decided in 1972. Separation from bombardments by the larger culture is even less likely than it was twenty years ago, and the risks to children differ from those that existed twenty years ago. The Amish families in *Yoder* maintained a "separatist" lifestyle that was unique even in 1972 in its successful avoidance of outside worldly influences. Conversely, the *Curtis* and *Alfonso* parents and children have never asserted that they maintain lives highly isolated from contemporary American society. They do not argue that except for the public school experiences, their children are immune to the cultural bombardment—and indeed coercion—accomplished through media messages.

Religious pluralism could be encouraged in *Yoder* because the court found that, on balance, protection of the parents' constitutional rights presented no significant threat to the children or to society. The same determination, however,

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138. *Id.* at 235-36. In considering what effect an exemption from the public school education requirement would have on the Amish children's educational future, one expert witness on education testified that the Amish system of learning through practicing skills directly relevant to their adult role in the Amish community was "ideal," and "perhaps superior to ordinary high school education." *Id.* at 212.

139. *Id.* at 212-13.

140. *Id.* at 222.

141. *Id.* at 223 n.11.

142. *Id.* at 228-29.

cannot be made regarding the factual scenarios presented in the *Alfonso* and *Curtis* cases. Because of the AIDS epidemic, the significant threats to children require a broad array of state actions—including condom programs—to protect against cultural bombardment advocating risk and irresponsibility.

III. ADOLESCENTS, SEX AND AIDS

> "My theory . . . is don't do it before you're twenty one, and then don't tell me about it."[143]

Prior to the first AIDS diagnosis in 1982,[144] parental reluctance to acknowledge sex as a potential force in children's lives did not carry the grave consequences that it now bears. Before AIDS, the problems associated with adolescent sexual activity were not generally life-threatening. Parents could emotionally armor themselves against troubling statistics regarding the high incidence of teenage sexual behavior by adopting the belief that it was not their children, but "other people's children" who were having sex. Although some parents were correct in their assessment of their children's lack of sexual activity, and others were not, neither the mistaken parents nor their children typically faced a real risk of death as a consequence of sexual activity.

Adolescents now are engaging in sexual intercourse and are beginning to become infected with sexually transmitted diseases, including HIV, in very significant numbers.[145] More than eighty percent of Americans have had sexual intercourse by the time they reach the twelfth grade.[146] As a result, two and one-half million adolescents annually contract a sexually transmitted disease.[147]

In 1989, AIDS became the sixth leading cause of death for persons aged

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143. Ellen Goodman, *When We Talk About Sex and Teens, Can't We Use Words Besides 'No'?*, BOSTON GLOBE, June 22, 1995, at 11 (quoting Hilary Rodham Clinton's reaction to the topic of her daughter Chelsea and sex).

144. As early as 1979, physicians in New York, San Francisco and Los Angeles began seeing gay men with unusually violent forms of *Pneumocystis carinii* pneumonia (PCP) and Kaposi's sarcoma (KS). These diseases generally do not affect adults with intact immune systems. Initially AIDS was termed GRID, gay-related immunodeficiency, or AID, acquired immune deficiency. The term AIDS, for acquired immune deficiency syndrome, was officially adopted by the Centers for Disease Control in 1982 as the associated diseases were identified. Jan Zita Grover, *AIDS: Keywords*, *in* AIDS: CULTURAL ANALYSIS, CULTURAL ACTIVISM 17, 18-19 (Douglas Crimp ed. 1988).

145. Alfonso v. Fernandez, 606 N.Y.S.2d 259, 268 (N.Y. App. Div. 1993) (quoting Dr. Margaret Hamburg, Acting Commissioner of the New York City Department of Health).

146. *Facing Facts: Sexual Health for America's Adolescents: The Report of the National Comm'n on Adolescent Sexual Health*, SEICUS REPORT (Sex Information and Education Council of the U.S.), Aug.-Sept. 1995, at 4.

147. Benjamin R. Barber, *America Skips School: Why We Talk So Much About Education And Do So Little*, HARPER'S MAG., Nov. 1993, at 39.

fifteen to twenty-four.[148] Because this disease has an eight to ten-year latency period, the statistics suggest that the majority of those persons were infected as adolescents.[149]

American law has had a long history of commitment to protecting the "best interests" of children. In light of this history, it is very puzzling that judges refuse to endorse governmental efforts to protect minors,[150] in spite of the statistics portraying a sexually active and highly vulnerable adolescent population. This judicial refusal can perhaps be understood as arising out of a denial of the meaning of the AIDS threat to adolescents, an illusion which may mirror a popular misunderstanding that only "other" people get AIDS.[151] Commentators have documented the cultural impulse toward segregation of potential AIDS victims as delinquent "others."[152]

In Western culture, there have been strong themes expressed in established religious dogma portraying disease as a force affecting those who have disobeyed generally accepted rules of conduct. Consider, for example, the Biblical reference to the plague of "boils"[153] that God sent to the people of Egypt as punishment for the Pharaoh's refusal to obey His Word:

> Then the Lord said to Moses and Aaron, "Take handfuls of soot from a furnace and have Moses toss it into the air in the presence of Pharaoh. It will become fine dust over the whole land of Egypt, and festering boils

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148. Center for Disease Control and Prevention, *Selected Behaviors That Increase Risk for HIV Infection Among High School Students—United States, 1990*, 41 MORBIDITY AND MORTALITY WEEKLY REPORT 231(1992).

149. *Id.*

150. Courts, however, will often reject parties' religious objections to medical procedures, where failure to obtain the medical service would place the person's life in jeopardy. *See* Crouse-Irving Memorial Hosp., Inc. v. Paddock, 127 Misc.2d 101 (N.Y. Sup. Ct. 1985) (court ordered blood transfusion for pregnant woman during delivery of child despite religious objections); *In re* McCauley, 565 N.E.2d 411 (Mass. 1991) (court ordered blood transfusion to eight-year-old leukemia patient despite Jehovah's Witness parents' refusal to consent to procedure); *In re* Cabrera, 552 A.2d 1114 (Pa. Super. Ct. 1989) (parents' religious objections were outweighed by State's interest in health of six-year-old child with sickle cell anemia needing blood transfusion).

151. The overwhelming majority of those within the "other" classification have been gay men. Male-to-Male sexual contact is the most frequently reported type of transmission of HIV in persons with AIDS. *Update on AIDS in Men Who Have Sex with Men*, 52 AMERICAN FAMILY PHYSICIAN 667 (1995).

152. Senator Jesse Helms demands "common sense about a disease transmitted by people deliberately engaging in unnatural acts." *Jesse Helms' Venom*, BOSTON GLOBE, July 7, 1995, at 14. Helms was arguing for reducing federal AIDS funding upon assertions that more people die from diseases that receive less federal financing than AIDS. Public Health Service figures refute Senator Helms' claims. *Id.*

153. It has been suggested that "boils" were probably skin anthrax, a black, burning abscess that developed into a pustule, and which seriously affected the knees and legs . *Exodus* 9:8, n.9:9 (NIV Study Bible 1985).

will break out on men . . . throughout the land . . . ."[154]

As a result of an established religious connection between disease and wrongdoing, plagues and epidemics were sometimes "moralized" as punishments imposed on those who had committed evil acts. The establishment of a causal connection between "good" and "bad" human behavior, and health and disease in the human body, reinforced the importance of adherence to religious teachings. This connection drew clear distinctions between those who lived "right" lives, and the "others" who did not.

A stark instance of modern perpetuation of the belief system connecting disease with immorality arose in 1979-1981, when gay men were dying from illnesses unusual in young people, but which had not yet been diagnosed as AIDS.[155] As the numbers of deaths mounted, medical staffs of New York hospitals informally dubbed what would later become known as AIDS, as WOGS: the Wrath of God Syndrome.[156] The "moral" panic and confusion created by AIDS continues to obstruct concrete efforts to stem the spread of this disease among adolescents. As a disease primarily transmitted through sexual contact,[157] AIDS invites the perception that it is willfully contracted through "evil" acts violative of social mores and religious teachings.[158] The cultural construction of AIDS, then, atavistically repeats deeply-rooted Western connections between disease and moral and spiritual disorder.

It is likely that some courts will consider the public health emergency presented by AIDS in the same way American society views AIDS—as an unprecedented "sexual" disease carrying "moral" implications.[159] The existence of such an underlying mindset may be the best explanation of otherwise incomprehensible judicial balancing in favor of privacy interests and against state efforts making condoms available to sexually active adolescents. In fact, AIDS presents not only a catastrophic medical crisis, but also an intellectual, emotional and spiritual conflict over the human body and its capacities for sexual pleasure.[160]

Judicial ambivalence or squeamishness about endorsing the aggressive combating of AIDS should not be surprising, given the popular responses to the epidemic. As a barometer of public attitudes, consider the following warning, sent by the International Banana Association to the Public Broadcasting Service

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154. *Exodus* 9:8 (NIV Study Bible 1985).

155. *See* Paula A. Treichler, *Aids, Homophobia, and Biomedical Discourse: An Epidemic of Signification*, *in* AIDS: CULTURAL ANALYSIS, CULTURAL ACTIVISM 31 (Douglas Crimp ed. 1988).

156. *Id.* at 52.

157. *See supra* note 151.

158. *See supra* note 153 and accompanying text.

159. *See* Simon Watney, *The Spectacle of AIDS*, *in* AIDS: CULTURAL ANALYSIS, CULTURAL ACTIVISM 71 (Douglas Crimp ed. 1988).

160. For an instructive discussion on Americans' reticence to engage in "sexual" discourse, see Leo Bersani, *Is the Rectum a Grave? in* AIDS: CULTURAL ANALYSIS, CULTURAL ACTIVISM 197 (Douglas Crimp ed. 1988).

following the airing of an educational video promoting "safer sex," wherein the narrator utilized a banana for a demonstration on proper condom use:

> I must tell you, Mr. Christiansen . . . that our industry finds such usage of our product to be totally unacceptable. The choice of a banana . . . constitutes arbitrary and reckless disregard for the unsavory association that will be drawn by the public and the damage to our industry that will result therefrom.
>
> . . . .
>
> . . . I have no alternative but to advise you that we intend to hold PBS fully responsible for any and all damages sustained by our industry as a result of the showing of this AIDS program depicting the banana in the associational context planned. Further, we reserve all legal rights to protect the industry's interests from this arbitrary, unnecessary, and insensitive action.[161]

It is not clear whether the objection by the letter-writer relates to associations between bananas and penises, between bananas and condoms, or between bananas and the topic of AIDS. What is quite clear, however, is the letter-writer's perception that the American public would find those associations "unsavory." Similarly, the plaintiffs in *Curtis* clearly confirmed this reticence to engage in open discourse regarding sex: "There is a reason that, even in this day and age, some adults suffer embarrassment when purchasing condoms from the drug store. It is because adults know what condoms are used for, and a certain societal stigma attaches to the open, public display of sexual intent."[162]

The perception of the letter-writer and the *Curtis* plaintiffs seems accurate. It is unquestionable that many are not comfortable with any acknowledgment, outside the private realm of the marital bedroom, of sexual activity or of methods, such as condom usage, directed at preventing sexually-transmitted disease. A resistance to perceiving AIDS as affecting "us" and "our children" rather than "others," and a common squeamishness about discussion of sexual matters unquestionably affect judicial approaches to condom availability programs. That resistance and squeamishness may impede essential efforts to assure the health and well-being of young people for whom sexual activity presents risks unimagined by the framers of the Constitution.

IV. ROLE OF JUDICIARY—IDENTIFYING CHILDREN'S RIGHTS

While American law has traditionally attended to the interests of children, the task of identifying and fostering those interests becomes singularly difficult in a rapidly changing culture. In a world marked by increasingly intense division and hostilities among social groups and by the increasing threat of AIDS, courts must

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161. Douglas Crimp, *How to Have Promiscuity in an Epidemic in* AIDS: CULTURAL ANALYSIS, CULTURAL ACTIVISM 237, 255-56 (Douglas Crimp ed. 1988) (quoting letter of Robert M. Moore to PBS).

162. Brief of Appellants at 46, Curtis v. School Comm., 652 N.E.2d 580 (Mass. 1995).

act with searching imagination in identifying the interests to be protected before they can begin to determine the proper scope of state involvement.

While most persons are quick to assert commitment to protecting children, claims of advancing children's interests can often become slogans, and children can sometimes become pawns in political struggles. The recent tragedy that occurred in April 1993, at the Branch Davidian compound in Waco, Texas was a situation in which children lost their lives due to a conflict between government and sectarian groups. During the fifty-one days prior to the culmination of the Branch Davidian saga, both sides asserted the well-being of the children remaining within the heavily-armed compound as a primary consideration.[163] While serious questions may remain concerning the precise sequence of events, it appears that at various times during the standoff between the Federal Government and the members of the religious sect, federal agents in battle tanks threatened the cult members by approaching their residence.[164] In response, the Branch Davidians utilized children as powerful weapons by raising their children behind the windows of the compound, in plain view of the government agents.[165]

When Attorney General Janet Reno approved the Government's assault on the members of the religious sect remaining within the compound, she asserted that her fears for the safety of the children within the Branch Davidian compound were a major factor in that decision.[166] After a nearly two-month impasse,[167] it was apparently her belief in the existence of a threat to the well-being of the Branch Davidian children that caused Ms. Reno to order federal agents to invade the compound.[168] Whatever uncertainties remain concerning the motivation of the actors in the Waco situation, it is unquestionable that the discourse of children's interests was involved and manipulated, consciously or unconsciously, by all concerned. It is also unquestionable that, in spite of widely broadcast rhetoric by contending forces claiming to protect children, numerous children lost their lives.

In the aftermath of Waco, divisions about the protection of children have deepened. During the two years since the invasion of the Branch Davidian compound, "'Waco' has become a rallying cry of right-wing paramilitary groups . . . who say that the raid epitomizes . . . a Federal Government that has trampled

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163. Nancy Gibbs, *Oh my God, They're Killing Themselves!*, TIME, May 3, 1993, at 26.

164. *Id.*

165. *Id.*

166. Stephen Labaton, *Reno Sees Error in Move on Cult*, N.Y. TIMES, Apr. 20, 1993, at A1.

167. In February 1993, Federal agents tried to enter the compound to arrest the group's leader, David Koresh, on suspicion of violating firearms laws. After four agents and five Branch Davidians were killed, Federal agents and those inside the compound engaged in an armed standoff that lasted fifty-one days. *Id.*

168. *Id.* Prior to ordering the Government to inject tear gas into the compound, Ms. Reno spoke with doctors to obtain assurances that the tear gas would not injure the children. *Id.* Ultimately, Ms. Reno was informed by a Branch Davidian member who had recently left the compound that cult leader David Koresh was "slapping babies around" and beating children. Sam Verhovek, *Scores Die as Cult Compound is Set Afire After F.B.I. Sends in Tanks with Tear Gas*, N.Y. TIMES, Apr. 20, 1993, at A20.

on the rights of individuals and turned on its own people."[169] Each year since the Waco fire, hundreds of persons travel to Texas on April 19th to attend vigils commemorating the death of the Branch Davidians.[170] Most of the persons in attendance belong to "citizen militias"[171] who, like the Branch Davidians, do not trust the government and are preparing themselves for the day that government troops invade their homes and "steal" their children.[172] A lack of consensus about what children need and how they should be protected has also been evident at the highest levels of governmental policy-making in this country. President Bill Clinton, together with Hillary Rodham Clinton, exemplify the national confusion over who shall control the messages communicated to American children.

In 1993, President Clinton appointed Dr. Joycelyn Elders Surgeon General of the United States.[173] Fifteen months later, during a United Nations AIDS Day symposium, Dr. Elders was asked to comment on the implementation of expanded discussion and promotion of masturbation in the nation's schools, in order to discourage school-age children from engaging in riskier forms of sexual activity.[174] She replied:

> With regard to masturbation, I think that is something that is a part of human sexuality, and a part of something that perhaps should be taught[175] . . . [b]ut we've not even taught our children the very basics. And I feel that we have tried ignorance for a very long time and it's time we try education.[176]

This candid response led President Clinton to ask immediately for her resignation.[177]

Moments after she uttered her response to the query regarding children and masturbation, Dr. Joycelyn Elders was asked why she had answered such a politically volatile question. She replied: "I'm not a politician, I'm a physician . . . I'm about improving the health of all Americans. I'm not about getting elected to a public office."[178] Dr. Elders' sharp response brings to light the reality that those who assert the right to control the health and well-being of children are often influenced and encumbered by religious, political, and financial interests that

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169. Katharine Q. Seelye, *House Schedules Hearings on Assault Against Branch Davidians*, N.Y. TIMES, June 2, 1995, at A22.

170. Ginia Bellafante, *Waco: The Flame Still Burns*, TIME, May 1, 1995, at 47.

171. Christopher J. Farley, *Patriot Games*, TIME, Dec. 19, 1994, at 48.

172. *Id. See also* Evan Thomas & Russell Watson, *Cleverness and Luck*, NEWSWEEK, May 1, 1995, at 30.

173. James Popkin, *A Case of Too Much Candor*, U.S. NEWS & WORLD REPORT, Dec. 19, 1994, at 31.

174. *Id.*

175. *Id.*

176. Michael Gartner, *You Pick: Candid Doctor or High-Flying General*, USA TODAY, Dec. 27, 1994, at A11.

177. *Id.*

178. Popkin, *supra* note 173, at 31.

obstruct the development of a workable social consensus.

Consider the inconsistent pattern of Hillary Rodham Clinton's proposals concerning the problems of meeting the multifaceted needs of children in this country. In 1973, Ms. Rodham Clinton urged an increased awareness of conflicting parental and state attempts at addressing the needs of children. Noting the lack of existing guidelines for resolving that issue, she stated:

> There is an absence of fair, workable, and realistic standards for limiting parental discretion and guiding state intervention. . . . Securing children's rights through the legislatures and the courts will include generating new lines of legal theory, grounded in past-precedent but building onto it more reasonable laws and legal interpretations for the future . . . . [T]he resolution of theoretical problems . . . will . . . strip away the legalistic camouflage surrounding the continuing problems of unchecked discretion, inadequate resources, and widespread public indifference.[179]

Hillary Rodham Clinton recognized that this nation has failed at developing a functional method of securing protection for children, and urged an employment of fresh, uncamouflaged discourse to remedy this situation. Ms. Clinton, however, seems to have shifted her perception of how to address the difficult questions presented by the activities in which children and adolescents presently engage.

In June 1995, Hillary Rodham Clinton was asked by a news reporter to comment on the subject of adolescents engaging in premarital sexual activity. Ms. Clinton stated that her daughter Chelsea should wait until age twenty-one to become sexually active, and further suggested that when she does engage in sex, Chelsea should not discuss the matter with her mother.[180] Ms. Clinton's comments in 1973 and in 1995 express a recognition of the problems presented in meeting children's needs and the methods to remedy those problems. But Ms. Clinton, sometimes identified as radical in her defense of children's rights, evidences an alarming refusal to generate new lines of communication, particularly where sensitive sexual matters involving adolescents are involved. In a world much more dangerous than the one in which Ms. Clinton wrote in 1973, it is disappointing to see her failure to engage with the new challenges of defining children's interests and rights.

Religious beliefs, for many, provide "truth" and guidance in resolving moral quandaries in a temporal world, and are thus a major force in supporting day-to-day existence. However, if the data regarding the high incidence of adolescent sexual activity is to be believed, religion does not effectively insulate even religious children from the coercion presented by constant exposure to multimedia elements of American culture which relentlessly bombard the underpinnings of their value systems.

At the present time, when intense hostilities focus on the meaning of children's best interests, it becomes essential for courts to contribute to the formulation of new understandings. *Alfonso* and *Curtis* have not made such

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179. Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487, 506 n.4 (1973).

180. *See supra* note 143.

contributions. Instead, the *Alfonso* and *Curtis* decisions promote the further polarization of the state and some Christian parents' positions in the national discourse regarding the availability of free condoms in educational institutions, and thus the control over one aspect of the lives of American adolescents. Although these opinions vividly expose an enormous discordance in approaches to balancing and reconciling interests asserted by or on behalf of parents, children, and the state in an arena in which adolescence, sex, AIDS and religion co-exist and contend, they manifest a sameness in their failure to engage at a deep level with the changed social context.

In *Alfonso*, the court made a casual reference to this nation's "fundamental values."[181] However, the court did not explain what those values encompassed. The court therefore assumed a common, national understanding of those values. In a time of uncertainty and conflict about values, that assumption is inadequate. As long as courts follow the lead of *Alfonso* and *Curtis*, they will not contribute to a deepened understanding of children's needs and to the articulation of useful constitutional doctrine regarding Church and State relations.

CONCLUSION

The identification and fostering of children's interests is not a simple task in a deeply divided society. The challenge of protecting children has been presented in the "condom availability" cases in the context of deepening divisions between Church and State, and an increasing threat to adolescents by the AIDS epidemic. Courts which have thus far addressed the "condom availability" issue have been disappointing in their failure to develop constitutional doctrine by frank exploration of the cultural context in which the issues arise, the threat of AIDS, and the uncertainty of "fundamental values." Such candid assessment is an essential element in the process of reaching the kinds of consensus that will permit the actual survival and well-being of children.

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181. The court stated: "As with other grave risks we have faced during the past two centuries, the threat of AIDS cannot summarily obliterate this Nation's fundamental values." Alfonso v. Fernandez, 606 N.Y.S.2d 259, 266 (N.Y. App. Div. 1993) (citing Ware v. Valley Stream High School Dist., 550 N.E.2d 420 (N.Y. 1989)).

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NOTES

THE FAIR PAY ACT OF 1994

THOMAS N. HUTCHINSON*

INTRODUCTION

On July 20, 1994, Representative Eleanor Holmes Norton[1] introduced the Fair Pay Act of 1994.[2] Norton's bill seeks pay equity for women and minorities by requiring employers to pay the "same wage to workers who hold jobs that are equivalent in some combination of skill, effort, responsibility, and working conditions."[3] Norton characterizes the proposed legislation as completing the unfinished task begun by the Equal Pay Act of 1963, which sought to bridge the gap between men's and women's wages.[4]

The task is indeed unfinished. In 1992, women earned only seventy-one cents for every dollar earned by men.[5] Although statistics show improvement since 1982, when the ratio was sixty-two cents for every dollar earned by men, Norton attributes half of the gains to an overall decrease in male wages.[6] She argues that

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1. Representative Eleanor Holmes Norton (D-D.C.) is a lawyer and a tenured professor of law at the Georgetown University Law Center. She serves on the Board of Governors and was the chair of the Equal Employment Opportunity Commission from 1977-1981.

2. The bill in pertinent portion states:

> No employer having employees subject to any provisions of this section shall discriminate between its employees on the basis of sex, race, or national origin by paying wages to employees or groups of employees at a rate less than the rate at which the employer pays wages to employees or groups of employees of the opposite sex or different race or national origin for work in equivalent jobs, except where such payment is made pursuant to a seniority system, a merit system, or a system which measures earnings by quantity or quality of production.

H.R. 4803, 103d Cong., 2d Sess. § 3 (1994).

3. *The Fair Pay Act of 1994: Hearings on H.R. 4803 Before the Joint Subcomm. of House Educ. and Post Office and Civil Service Comm.*, 103d Cong., 2d Sess. (1994) [hereinafter *Hearings*] (statement of Michele Leber, Treasurer, National Committee on Pay Equity).

4. *See infra* Part I.A.

5. *Hearings, supra* note 3 (opening statement of Representative Eleanor Holmes Norton).

6. *Id.*

the continued gap between male and female wages illustrates the insufficiency of the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964. More specifically, she notes that the Equal Pay Act applies only to "equal pay for equal work" and gender-based discrimination.[7] It does not extend protection to comparable jobs or to pay discrimination based on race or national origin.[8] Although Title VII of the Civil Rights Act of 1964 prohibits discrimination with respect to race, color, religion, sex, or national origin,[9] and has not specifically been limited to "equal pay for equal work,"[10] lower courts have refused to delve into a comparison of dissimilar jobs.[11]

Furthermore, in recent years the Equal Employment Opportunity Commission (EEOC) has pursued fewer and fewer claims.[12] As delegate at-large for Washington D.C., Norton seeks to remedy the ineffectiveness of current legislation and insufficient implementation through comparable worth legislation aimed at eliminating pay inequities between female-dominated and male-dominated occupations.

Part I of this Note surveys the history of equal pay legislation, including the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964. Part II discusses why current remedies are unsuitable for wage disparity claims. Part III analyzes the "equal pay for comparable work" theory and the latest legislative attempt to codify and implement a comparable worth doctrine.

I. HISTORY OF PAY EQUITY LEGISLATION

The ideas proposed by the Fair Pay Act of 1994 are not new. The concept of equal pay for comparable jobs has been drifting through legislation for almost fifty

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7. *Id.*

8. *Id.*

9. 42 U.S.C. § 2000e-2(a) (1994).

10. County of Washington v. Gunther, 452 U.S. 161 (1981). The Court provided protection based on a Washington State survey that indicated wage disparities between jobs the state had determined were of comparable value. Nevertheless, the Court specifically denied passing any judgment on the comparable worth doctrine stating, "Respondents' claim is not based on the controversial concept of 'comparable worth' . . . ." *Id.* at 166. Some scholars have noted the Court's distinction was likely based on the fact that the Court did not have to engage in a rating system of jobs. The State of Washington had already conducted a study and the Court only had to look at the uncontested evidence presented. Brendan Mangan, *Comparable Worth Claims Under Title VII: Does the Evidence Support an Inference of Discriminatory Intent?*, 61 WASH. L. REV. 781, 784 n.22 (1986).

11. *See infra* notes 64-67 and text accompanying notes 60-67.

12. *See Hearings*, *supra* note 3 (statement of Gene R. Voegtlin, Legislative Liaison, National Federation of Federal House Education/Select Education and Civil Rights Fair Pay Act). *See also Commission Attorneys Filed Fewer Cases; Brought in Less Money During Fiscal 1995*, Employment Discrimination Rep. (BNA) No. 14, at 426 (April 3, 1996) (noting a decline in 1995 compared with 1994 in all but disability suits).

years. Initially, wage disparity investigations were limited to equal work.[13] In 1867, Congress established the Joint Select Committee on Retrenchment to examine the existing appointment procedures and salaries in the federal civil service.[14] The Committee sent out thirty-seven interrogatories to government officers.[15] The responses to those interrogations confirmed the suspicion that women were paid less than men for equal work.[16] The proposed solution was either to hire more women or to eliminate differentials.[17]

In 1870, Congress enacted legislation that adopted the principle of equal pay for equal work in the federal civil service.[18] The legislation was not generally implemented until the Classification Act of 1923 when Congress established a uniform system of job grades and salaries.[19] Although the Classification Act was largely limited to the federal sector, Montana and Michigan had since adopted broad equal pay laws in 1919 for private employers. [20]

With the advent of World War II and the influx of women into the work force, problems of pay inequality came into sharper focus. Expanding beyond the equal pay for equal work concepts proposed thus far, the War Labor Board approved wage increments to correct gross inequalities in pay for comparable work. The Board stated there should be "'no discrimination between employees whose production [was] substantially the same on comparable jobs.'"[21] The Board issued General Order No. 16 on November 24, 1942 authorizing "increases which equalize the wage or salary rates to females with the rates paid to males for comparable quality and quantity of work on the same or similar operations . . . ."[22] The General Order was only an authorization, however, and did not compel employers to equalize pay.

Finally, in 1945, the War Labor Board introduced a comprehensive federal equal pay bill that mandated elimination of wage disparities.[23] Both the

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13. Carin Ann Clauss, *Comparable Worth—The Theory, Its Legal Foundation, and the Feasibility of Implementation*, 20 U. MICH. J.L. REF. 7, 12-14 (1986).

14. *Id.* at 10-11.

15. *Id.* at 11.

16. *Id.* at 12.

17. *Id.* at 11-12.

18. *Id.* at 12.

19. *Id.*

20. *Id.* at 12-14.

21. Deborah L. Rhode, *Occupational Inequality*, 1988 DUKE L.J. 1207, 1227 (quoting War Labor Board).

22. PROGRAM APPRAISAL AND RESEARCH DIV., NATIONAL WAR LABOR BD., NATIONAL WAR LABOR BOARD POLICY ON EQUAL PAY FOR EQUAL WORK FOR WOMEN (1945) (Research and Statistics Report No. 32) (quoting General Order No. 16 as amended 1944), *reprinted in Equal Pay for Equal Work for Women: Hearings on S. 1178 Before a Subcomm. of the Senate Comm. on Education and Labor*, 79th Cong., 1st Sess. 33 (1945) [hereinafter *1945 Hearings on S. 1178*].

23. S. 1178, 79th Cong., 1st Sess. (1945), *reprinted in 1945 Hearings on S. 1178*, *supra* note 22, at 1.

government and public sectors widely supported the proposed legislation[24] and six states had similar bills.[25] Nevertheless, the directives lost force and the Senate failed to come to a vote.[26] The bill was reintroduced to no avail in every subsequent session for nineteen years.[27]

Although the bill's language initially applied to "work of comparable character on jobs the performance of which requires comparable skills,"[28] the comparable language was one of the biggest impediments to passage.[29] As a result, the language was changed to "equal work on jobs the performance of which requires equal skills."[30] The bill, then known as the Equal Pay Act, finally passed, was signed on June 10, 1963, and went into effect on June 1, 1964.[31]

A. Equal Pay Act of 1963

The Equal Pay Act of 1963 prohibits employers from paying lower wages to employees of one sex than to employees of the other sex for performing equal work, except where such payment is made pursuant to a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or a differential based on any factor other than sex.[32]

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24. Clauss, *supra* note 13, at 14.

25. *1945 Hearings on S. 1178, supra* note 22, at 9, 39-40. The six states were Illinois, Massachusetts, Michigan, Montana, New York and Washington. *Id.*

26. Clauss, *supra* note 13, at 14.

27. *Id.*

28. H.R. 8898, 87th Cong., 1st Sess. § 4 (1962), *reprinted in Equal Pay for Equal Work: Hearings on H.R. 8898 and H.R. 10226 Before the Select Subcomm. on Labor of the House Comm. on Education and Labor*, 87th Cong., 2d Sess. 6, 7 (1962) [hereinafter *Equal Pay for Equal Work Hearings*]; *see also* Clauss, *supra* note 13, at 14-15.

29. Clauss, *supra* note 13, at 14.

30. H.R. 3861, 88th Cong., 1st Sess. § 4 (1963), *reprinted in Equal Pay Act: Hearings on H.R. 3861 and Related Bills Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 88th Cong., 1st Sess. §§ 2, 3 (1963) [hereinafter *1963 Hearings on H.R. 3861*]; *see also* 108 Cong. Rec. 14,771 (1962) (House discussion of proposed Equal Pay Act amendments); *see also* Clauss, *supra* note 13, at 14-15 & n.35.

31. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (1964) (codified at 29 U.S.C. § 206(d) (1994)).

32. *Id.* The pertinent portion states:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

To establish a prima facie case of discrimination under the Equal Pay Act, the employee must show that the employer pays workers of one sex more than workers of the opposite sex for jobs that are equal in content.[33] The employee must establish that skill, effort, and responsibility are all "equal" and performed under similar working conditions.[34] Although courts initially struggled with the term "equal work," wavering on whether work must be identical, judicial clarification came in 1974 with *Corning Glass Works v. Brennan*, in which the United States Supreme Court determined that jobs need only be "substantially equal."[35]

Still, the legislative history of the Equal Pay Act illustrates rejection of any comparable worth standard in the meaning of "substantially equal."[36] During the Equal Pay Act hearings, the Kennedy Administration strenuously urged adoption of the "comparable" language. Although the original bill contained the "comparable" language, Representative St. George offered an amendment limiting equal pay claims to jobs "the performance of which requires equal skills."[37] Representatives St. George and Landrum feared that employees of the Labor Department would harass businesses with various definitions of "comparable."[38] When the bill was reintroduced in 1963, it contained the St. George amendment. In addition, Representative Goodell clearly enunciated the rejection of the "comparability standards" when he stated:

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29 U.S.C. § 206(d)(1) (1994).

33. Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974).

34. "Skill" is an objective standard of ability or dexterity, "effort" is the physical or mental exertion necessary to perform the two jobs, and "responsibility" is the degree of an employee's accountability. Mack A. Player, *Exorcising the Bugaboo of "Comparable Worth": Disparate Treatment Analysis of Compensation Differences Under Title VII*, 41 ALA. L. REV. 321, 331 & nn.35-37 (1990). "Working conditions" need only be similar; however, its definition falls somewhere in the spectrum between equality and comparability. *Id.* at 333.

35. *Corning Glass Works*, 417 U.S. at 188. The case concerned an employer who paid a higher base wage to male night shift inspectors than it paid to female day shift inspectors, where the higher wage was independent of a shift differential paid to all night workers. *Id.* at 190. The employer argued the shifts were not "equal work" in that the groups experienced dissimilar working conditions. *Id.* at 197. The Court found, however, that Congress intended the term "working conditions" to be defined as an industrial relations specialist's term of art, not in lay person's terms. *Id.* at 202. In the industrial relations context, "working conditions" applies to surroundings and hazards, not the overall desirability of a job. *Id.* Consequently, the shifts were defined as "equal" and the employer was required to compensate the shifts equally. *Id.* at 203.

The legislative history of the Equal Pay Act clearly illustrates the rejection of the comparability standards. The legislative history is less clear, however, on the narrowness of the term "equal," stating only that the jobs should be "virtually identical," "very much alike," "closely related." 109 CONG. REC. 9197 (1963).

36. *See generally* County of Washington v. Gunther, 452 U.S. 161, 184-88 (1981) (Rehnquist, J., dissenting).

37. 108 CONG. REC. 14,767 (1962).

38. *Id.* at 14,768-69.

> I think it is important we have a clear legislative history at this point. Last year when the House changed the word 'comparable' to 'equal' the clear intention was to narrow the whole concept. . . . We expect [the Equal Pay Act] to apply only to jobs that are substantially identical or equal.[39]

B. Title VII of the Civil Rights Act of 1964

Less than one month after the Equal Pay Act went into effect, Congress passed similar legislation with Title VII of the Civil Rights Act of 1964.[40] Title VII went beyond the scope of the Equal Pay Act and prohibited discriminatory employment practices against any individual because of race, religion, color, sex, or national origin.[41] The statute was aimed at "eliminating job segregation, as well as opening job opportunities for women."[42] Under Title VII, an employee can bring a cause of action based on disparate impact, where facially neutral employment practices have a discriminatory effect on a protected group,[43] or disparate treatment, where the employer is engaged in intentionally discriminatory employment practices.[44]

Disparate impact claims arise when an employer's facially neutral employment practices, which are not job related and consistent with business necessity, have a disproportionately adverse impact upon a group protected under Title VII.[45] The plaintiff need not prove intent under a disparate impact claim.[46] The employee establishes a prima facie case of discrimination by showing that a facially neutral employment practice has an uneven—disparate—impact on the employee or the employee's class. Once the employee has met the burden of production, the employer then has the burden of justifying its employment practice by proving job relatedness and business necessity.[47]

Disparate treatment claims, however, require the employee to prove an intent to discriminate.[48] In a disparate treatment claim, the employees must show that they: belong to a protected class, are qualified for the position, were rejected for

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39. 109 CONG. REC. 9197 (1963).

40. 42 U.S.C. §§ 2000e-1 to -17 (1994).

41. *Id.* § 2000e-2(a).

42. Nichole Jenkins, Note, *Labor Law—Comparable Worth Statistics and Studies Alone are Insufficient to Establish Sex-Based Wage Discrimination Under Title VII of the Civil Rights Act of 1964:* AFSCME v. Washington, 29 HOW. L.J. 669, 672 (1986).

43. Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

44. McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973).

45. 42 U.S.C. § 2000e-2(k)(2) (1994); *Griggs*, 401 U.S. at 432; *see also* Dothard v. Rawlinson, 433 U.S. 321, 328-29 (1977) (noting height and weight requirement disproportionately excluded women).

46. Jenkins, *supra* note 42, at 673.

47. 42 U.S.C. § 2000e-2(k)(2) (1994); *Griggs*, 401 U.S. at 432; *see also* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

48. Spaulding v. University of Wash., 740 F.2d 686, 705 (9th Cir. 1984), *cert. denied*, 469 U.S. 1036 (1984).

the position, and the employer continued to search for an employee with the same qualifications.[49] Once the employee meets this burden of production, a presumption of discrimination is established.[50] The burden of production then shifts to the employer to rebut the presumption of discrimination by articulating some legitimate nondiscriminatory reason for its action.[51]

Once the employer articulates some legitimate nondiscriminatory reason, the employee then has the opportunity to prove that the proffered reason is mere pretext.[52] Pretext may be established by showing that the employment practice, although outwardly legitimate, was applied unevenly[53] or by showing that the employer was more likely motivated by discrimination.[54] Once the employee proves pretext, the employee then must proceed to prove his case by a preponderance of the evidence.[55] During the shifting of the burden of production, the employee always retains the ultimate burden of persuasion.[56]

For the first decade following the enactment of the two statutes, most gender-based discrimination claims were brought under the Equal Pay Act.[57] This was true for two primary reasons. First, an Equal Pay Act action had several procedural advantages over a Title VII action. Title VII actions require deferral to the state unemployment agency, prior notice to the EEOC, and the receipt of a right to sue letter.[58] Second, the EEOC initially took the position that it would not accept any Title VII claims unless they met the "equal pay for equal work" standards of the Equal Pay Act.[59]

Beginning in the 1970s, however, women began to file actions under Title VII.[60] Employers initially defended these claims under the Bennett Amendment.[61]

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49. McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973). These are not strict qualifications, as the requirements will necessarily vary depending on the particular situation. Loyd v. Phillips Bros., Inc., 25 F.3d 518, 523 (7th Cir. 1994).

50. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-56 (1981).

51. *McDonnell Douglas*, 411 U.S. at 802; *Burdine*, 450 U.S. at 254.

52. *Burdine*, 450 U.S. at 256.

53. *McDonnell Douglas*, 411 U.S. at 804.

54. Mangan, *supra* note 10, at 786 n.33. The employee could, for example, produce evidence of derogatory or sexist remarks by supervisors.

55. *Burdine*, 450 U.S. at 253.

56. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2747-48 (1993).

57. Clauss, *supra* note 13, at 16.

58. *Id.*

59. *Id. See also* EEOC Guidelines on Discrimination Because of Sex, 30 Fed. Reg. 14,926, 14,928 (1965).

60. Clauss, *supra* note 13, at 16.

61. The Bennett Amendment states in pertinent part:

> It shall not be an unlawful employment practice under [Title VII] for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such is authorized by the provisions of [the Equal Pay Act].

42 U.S.C. § 2000e-2(h) (1994).

Although the Bennett Amendment had been added to Title VII in the last hours of its debate to overcome any confusion or conflict arising because of the two similar statutes,[62] employers interpreted the Bennett Amendment as limiting Title VII claims to those claims that met the "equal work" standard of the Equal Pay Act.[63] Lower courts were in conflict as to the interpretation of the statute. Some courts allowed the defense, limiting Title VII claims to the "equal work" terms of the Equal Pay Act, while other courts construed the Bennett Amendment as merely adopting the four affirmative defenses—seniority system, merit system, quantity or quality of production, and factor other than sex—found in the Equal Pay Act.[64]

In 1981, the United States Supreme Court resolved the Bennett Amendment conflict in *County of Washington v. Gunther*.[65] The Court stated that the purpose of the Bennett Amendment was to incorporate the four affirmative defenses of Title VII, not to limit it to "equal work" claims.[66] Although many hoped *Gunther* would open the door to pay equity claims, the Court's narrow holding was based upon a mass of statistical data the state had gathered through its own studies. Unfortunately for advocates of comparable worth, lower courts have largely refused to wander off the "equal work" path absent the strong statistical proof provided in *Gunther*.[67]

II. A SQUARE PEG AND A ROUND HOLE

With the failure of *Gunther* to open the doors to comparable worth claims, advocates of comparable worth have focused on enacting some form of pay equity legislation. As noted in Part I, comparable worth is not a new concept. Legislators have considered the idea of equal pay for jobs of comparable worth since the investigations of the War Labor Board in the 1940s.[68] Consequently, "comparable worth" has become a term encompassing numerous definitions.[69]

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62. County of Washington v. Gunther, 452 U.S. 161, 170 (1981).

63. Clauss, *supra* note 13, at 16.

64. *Compare* Lemons v. City of Denver, 620 F.2d 228 (10th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980); Keyes v. Lenoir Rhyne College, 552 F.2d 579, 580 (4th Cir. 1977), *cert. denied*, 434 U.S. 904 (1977); Orr v. Frank R. MacNeill & Son, Inc., 511 F.2d 166, 171 (5th Cir. 1975), *cert. denied*, 423 U.S. 865 (1975); Ammons v. Zia Co., 448 F.2d 117 (10th Cir. 1971) (requiring Title VII claims to meet "equal requirement of Equal Pay Act) *with* International Union of Elec., Radio & Mach. Workers v. Westinghouse Elec. Corp., 631 F.2d 1094 (3d Cir. 1980), *cert. denied*, 452 U.S. 967 (1981); Gunther v. County of Washington, 602 F.2d 882, 888-91 (9th Cir. 1979) (not limiting Title VII claims to "equal work" situations), *aff'd on rehearing*, 623 F.2d 1303 (9th Cir. 1979), *aff'd*, 452 U.S. 161 (1981).

65. 452 U.S. 161 (1981).

66. *Id.* at 170.

67. *See* Loyd v. Phillips Bros., 25 F.3d 518, 525 (7th Cir. 1994); International Union, U.A.W. v. Michigan, 886 F.2d 766, 768-69 (6th Cir. 1989); American Nurses Ass'n v. Illinois, 783 F.2d 716 (9th Cir. 1986); AFSCME v. Washington, 770 F.2d 1401 (9th Cir. 1985).

68. *See supra* notes 21-31 and accompanying text.

69. *See infra* Part III.C.

Comparable worth as used in this Note, and as apparently used in the Fair Pay Act, describes a class of wage discrimination claims based on a single employer's use of different criteria in establishing the wage rates for male-dominated and female-dominated jobs.[70] Pay equity studies show that when two job classifications have the same value according to the employer's job evaluation system, but one job is held primarily by men and the other by women, the job held by men usually pays more.[71]

Norton, like many proponents of comparable worth legislation, argues that both the Equal Pay Act and Title VII are unsuitable to cure the problems of pay equity.[72] Although a Title VII disparate treatment claim could theoretically remedy wage disparities in comparable occupations, cases since *Gunther* indicate that such claims are unlikely to succeed.[73] Both the Equal Pay Act and Title VII are designed to cure discrimination by eliminating discriminatory barriers to a free market. For example, by bringing a Title VII cause of action, an employee can overcome seemingly neutral employment practices that have an adverse impact on a protected group. In an ideally free market, once these barriers are overcome, women then have the opportunity to enter traditionally male-dominated occupations.[74] Once in those jobs, and doing equal work with men, women can defeat additional discrimination using the "equal pay for equal work" standards of the Equal Pay Act. Nevertheless, the Equal Pay Act and Title VII do not remedy the problems of wage disparities between male-dominated and female-dominated occupations because there may be no occupation for comparison.

A. Equal Pay Act Unsuitable

The Equal Pay Act is unsuitable to remedy wage disparities in female-

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70. Clauss, *supra* note 13, at 9.

71. Barbara J. Nelson, *Comparable Worth: A Brief Review of History, Practice, and Theory*, 69 MINN. L. REV. 1199, 1200 (1985) (book review); *see, e.g.*, WOMEN, WORK, AND WAGES: EQUAL PAY FOR JOBS OF EQUAL VALUE (D. Treiman & H. Hartmann eds., 1981).

72. *See Hearings, supra* note 3 (statement of Representative Eleanor Holmes Norton); *see also Hearings, supra* note 3 (statement of John Sturdivant, National President, American Federation of Government Employees House Education/Select Education and Civil Rights Fair Pay Act); Mangan, *supra* note 10, at 801-02. *But cf.* Robert J. Arnold & Donna M. Ballman, AFSCME v. Washington: *The Death of Comparable Worth?*, 40 U. MIAMI L. REV. 1039, 1074 (1986). *See also* George Rutherglen, *The Theory of Comparable Worth As a Remedy for Discrimination*, 82 GEO. L.J. 135, 145-46 (1993).

73. *See supra* note 64.

74. Of course, this is a highly generalized statement that fails to consider other hurdles women encounter. For example, barriers that block women from upper management—a problem known as the "glass ceiling"—is still a hotly debated and controversial issue. A study released in March of 1995 reported that 97% of the senior managers in Fortune 1000 industrial and Fortune 500 companies are male. Pamela M. Prah, *Glass Ceiling: Commission's Recommendations Elicit Mixed Marks from Employers, Advocates*, BNA EMPLOYMENT POLICY & LAW DAILY, Dec. 15, 1995.

dominated occupations because of its specific requirement of "equal pay for equal work." As mentioned above, the Equal Pay Act failed to pass for nineteen years, in part because it originally used comparable language. Although the specific definition of "equal" was uncertain for a number of years, the concern was construing the term too strictly. In *Corning Glass v. Brennan*, "equal" was defined as "substantially equal."[75] This definition would not apply to comparable worth cases.

No matter how broadly the Equal Pay Act is construed, it is unlikely that a court would permit a comparison of dissimilar jobs.[76] In a comparable worth claim there is no male counterpart; there is no control group with which to compare. The Equal Pay Act necessitates a group the complaining party can use as a basis of the prevailing wage.[77]

B. Title VII Unsuitable

Title VII is the usual means of pursuing a comparable worth remedy. Although its relaxed comparison standards and implied intent requirements make it initially attractive, its structural limitations and judicial interpretations make it an unsuitable remedy for persons employed in an undervalued female-dominated occupation. For example, assume high school cafeteria employees are predominately women and high school custodians are predominantly men. The females in the cafeteria make $6.00 an hour, while the male custodians make $12.00 an hour. The hiring criteria for each occupation is applied evenly to all applicants and the promotional criteria is applied evenly to all employees in that occupation. All of the cafeteria workers earn basically the same wage, as do all of the custodians. The problem is the wage depression across each occupation. Comparable worth advocates would argue that wages of cafeteria employees are suppressed because that occupation is dominated by women.[78] Even though the work is comparable when looking at skill, effort, responsibility, and working conditions, the custodians are paid more because that occupation is dominated by males.

Still, a disparate impact claim is an unsuitable cause of action because the job classifications affected are not the sort of specific, clearly delineated employment practices applied at a single point in the job delegation process to which disparate

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75. Corning Glass Works v. Brennan, 417 U.S. 188, 203 n.24 (1974).

76. Arnold & Ballman, *supra* note 72, at 1048.

77. Clauss, *supra* note 13, at 16.

78. This example is taken from *Jancey v. Everett Sch. Comm.*, as described by Marilyn Jancey in her testimony in support of the Fair Pay Act. *Hearings, supra* note 3 (statement of Marilyn Jancey, before the House Subcommittee on Select Education and Civil Rights concerning the Fair Pay Act). Massachusetts already has legislation outlawing pay discrimination in equivalent jobs. The cafeteria workers prevailed and were awarded a $1.1 million judgment, including damages, costs, and attorney fees. The school has appealed. Jancey v. Everett Sch. Comm., No. 89-3807, 59 Fair Empl. Prac. Cas. (BNA) 1314 (Mass. Super., Aug. 13, 1992).

impact analysis is aimed.[79] Disparate impact analysis is confined to the particular standards an employer uses in determining hiring criteria and advancement standards.[80] When those criteria or standards have a disparate impact on a protected group, the employee has a colorable claim.[81] Comparable worth doctrine, however, is not concerned with the hiring or promotional criteria, but with occupations dominated by one gender or race.[82] Employees in these occupations are not complaining of disparate employment practices within their occupation. Standards within their narrowly defined occupation are often applied equally to all members. Comparable worth is concerned with pay inequities between comparable occupations; occupations that "may be dissimilar, but whose requirements are equivalent, when viewed as a composite of skills, effort, responsibility, and working conditions."[83]

Disparate treatment initially seems a more viable option for comparable worth claims. Plaintiffs which have brought claims based on wage disparities complaints have traditionally attempted to do so using disparate treatment. Nevertheless, a disparate treatment claim gives the employer the opportunity to proffer a nondiscriminatory reason for its actions. The proffered reason is often to point to prevailing market rates, and market rates usually satisfy the rational relationship requirement.[84] Market rates reflect factors that define the value of different jobs, including the availability of workers in a particular occupation and their ability to bargain collectively for higher wages.[85] Consequently, if women are to use a disparate treatment action, they must present substantial proof that the market justification is mere pretext and then prove their case by a preponderance of the evidence. This has proven to be an especially difficult burden when the jobs are dissimilar but comparable in value.

C. Judicial Concurrence

In a small number of cases sufficient proof is available. In *Gunther v. Washington,*[86] the Court held that "claims for sex-based wage discrimination can also be brought under Title VII even though no member of the opposite sex holds an equal but higher paying job, provided that the challenged wage rate is not exempted under the Equal Pay Act's affirmative defenses . . . ."[87] The respondents in *Gunther* were female prison guards who patrolled the female section of the

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79. Spaulding v. University of Wash., 740 F.2d 686, 708 (9th Cir. 1984), *cert. denied*, 469 U.S. 1036 (1984).

80. Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

81. *Id.* at 429.

82. Laura B. Pincus, *Free Market Approach to Comparable Worth*, 43 LAB. L.J. 715 (1992).

83. H.R. 4803, 103d Cong., 2d Sess. § 3(b)(4)(B) (1994).

84. AFSCME v. Washington, 770 F.2d 1401, 1407 (9th Cir. 1985); Arnold & Ballman, *supra* note 72, at 1066-67.

85. Mangan, *supra* note 10, at 790.

86. 452 U.S. 161 (1981).

87. *Id.* at 168.

prison.[88] They claimed they were paid less than the male prison guards who patrolled the male section.[89] The female guards argued that the pay inequities were due to unintentional discrimination, submitting evidence that the prison had failed to adhere to its own study showing wage disparities.[90]

Although the female guards achieved pay equity in *Gunther*, the Court significantly limited its holding, stating that "Respondent's claim is not based upon the controversial concept of 'comparable worth' . . . ."[91] The Court based its decision on intentional discrimination, evidenced by the prison's self-initiated pay equity studies.[92] The Court noted it did not have to conduct its own subjective assessment of job criteria. The prison had already conducted such an evaluation and the Court merely had to look at the results.[93] With pay equity studies then being conducted by local governments in a number of different states, comparable worth advocates hoped that the resulting statistics might serve as a basis of proving discriminatory intent.

Nevertheless, four years later, in *AFSCME v. Washington*,[94] the Ninth Circuit overturned a decision requiring the State of Washington to act on its survey findings of wage disparities. In 1974, the State of Washington had conducted an initial, internal survey which indicated that wage disparities between female-dominated and male-dominated occupations were not attributable to job worth.[95] The state then commissioned an independent consulting firm to further assess the amount of wage disparities.[96] Two simultaneous surveys were conducted and both confirmed a gender-based wage disparity.[97] The state conducted similar surveys with similar findings again in 1976 and 1980.[98]

In 1980, AFSCME brought an action seeking immediate implementation of a comparable worth scheme.[99] AFSCME argued that the state's job classification system had a disparate impact on females.[100] In addition, AFSCME argued disparate treatment, in that the state's failure to act on the 1974, 1976, and 1980 surveys evidenced a discriminatory motive and reflected a historical pattern of gender-based wage disparity.[101] Although the district court agreed with AFSCME's reasoning, granting declaratory and injunctive relief, the court of appeals overturned its ruling on both disparate impact and disparate treatment

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88. *Id.* at 164.
89. *Id.* at 164-65.
90. *Id.* at 165.
91. *Id.* at 166.
92. *Id.* at 180.
93. *Id.* at 180-81.
94. 770 F.2d 1401 (9th Cir. 1985).
95. Mangan, *supra* note 10, at 786-87.
96. *Id.* at 786.
97. Arnold & Ballman, *supra* note 72, at 1040.
98. Jenkins, *supra* note 42, at 679.
99. *Id.*
100. *Id.*
101. *Id.*

grounds.[102] A finding of disparate impact was deemed inappropriate because the state utilized market rates as its hiring criteria and market rates bore a rational relationship to the value of the work. A disparate treatment finding was deemed inappropriate because of market justifications and the subsequent inability of AFSCME to prove intentional discrimination by a preponderance of the evidence.[103]

With the Equal Pay Act and Title VII arguably unsuitable for comparable worth claims, and the judiciary's reluctance to recognize pay equity studies as a basis for discriminatory intent, many comparable worth advocates have switched their efforts towards enacting comparable worth legislation. Norton's proposed Fair Pay Act eliminates many of the traditional concerns about comparable worth. First, the Fair Pay Act applies only to single employers and does not mandate a national comparative system.[104] Second, it does not permit employers to lower the salaries of one occupation to equal the salaries of another.[105] Third, it allows the employer to continue to vary wages under the four affirmative defenses of the Equal Pay Act and Title VII.[106] Finally, it emphasizes the need for employer, employee, and public education on the issues of comparable worth.[107] In these four regards, the Fair Pay Act seems a viable solution to the unquestionable wage disparity between male-dominated and female-dominated occupations. Nevertheless, with little national discussion of comparable worth in the last seven years, and little understanding of how a comparable worth system could effectively operate, misinformation will likely prevent passage of the Fair Pay Act or similar comparable worth legislation.

III. THE TRADITIONAL ARGUMENTS AGAINST COMPARABLE WORTH

The traditional arguments against comparable worth can be divided into roughly four categories. First, some opponents refuse to recognize the problem addressed by comparable worth. They either believe that existing legislation will remedy inequities or deny the existence of gender-based wage disparities.[108] Second, opponents who do recognize wage disparities often blame the marketplace or women themselves.[109] Third, opponents often doubt the viability of a job

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102. *Id.* at 680.

103. *See also* Plemer v. Parsons-Gilbane, 713 F.2d 1127, 1134 (5th Cir. 1983); American Fed'n of State, County, & Mun. Employees v. County of Nassau, 609 F. Supp. 695, 708 (E.D.N.Y. 1985) (citing Spaulding v. University of Wash., 740 F.2d 686, 708 (9th Cir. 1984), *cert. denied*, 469 U.S. 1036 (1984)); Power v. Barry County, 539 F. Supp. 721, 726 (W.D. Mich. 1982); Connecticut State Employee's Ass'n v. Connecticut, 31 Fair Empl. Prac. Cas. (BNA) 191, 192-93 (D. Conn. 1983).

104. *See generally* H.R. 4803, 103rd Cong., 2d Sess. (1994).

105. H.R. 4803, 103d Cong., 2d Sess. § 3 (1994).

106. *Id.*

107. *Id.* §§ 6-7.

108. *See infra* Part III.A.

109. *See infra* Part III.B.

classification system. They argue any job classifications would be too subjective and important variables would go unrecognized.[110] Finally, opponents feel that comparable worth legislation would prove too costly, with benefits being outweighed by increases in spending, increases in unemployment among women, and depressed wages among male blue-collar workers.[111]

A. "No Problem Exists"

It is somewhat surprising that scholars still deny the existence of wage disparities.[112] Wage disparities have existed for almost two thousand years.[113] Although the Equal Pay Act has cured the most obvious wage gaps, and Title VII has opened many doors, women are still crowded into a small number of job categories that have no male counterparts.

Statistics show that about three-fifths of female workers are employed in jobs which are at least seventy-five percent female.[114] In the late 1980s, females were only half as likely to be partners in law firms, had only eight percent of state and federal judgeships, and occupied only two percent of corporate executive positions in Fortune 500 companies.[115] According to Norton and other proponents testifying in support of the Fair Pay Act, in 1992 women earned only seventy-one cents for each dollar earned by men, a mere twelve cent gain in thirty years.[116]

Today, female college graduates earn twenty-nine percent less than male college graduates, and only $1,950 a year more than high school educated white

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110. *See infra* Part III.C.

111. *See infra* Part III.D.

112. *See generally* Daniel R. Fischel & Edward P. Lazear, *Comparable Worth and Discrimination in the Labor Market*, 53 U. CHI. L. REV. 891 (1986); Nicholas J. Mathys & Laura B. Pincus, *Is Pay Equity Equitable? A Perspective that Looks Beyond Pay*, 44 LAB. L. J. 351 (1993); Pincus, *supra* note 82.

113. *Leviticus* states, "When a man shall make a special vow of persons to the Lord at your valuation, Then your valuation of a male from twenty years old up to sixty years old shall be fifty shekels of silver . . . . And if the person is a female, your valuation shall be thirty shekels." *Leviticus* 27:2-4 (Amplified).

114. Rhode, *supra* note 21, at 1209.

115. *Id.* at 1210.

116. *Hearings, supra* note 3 (statement of Michele Leber, Treasurer, National Committee on Pay Equity) (quoting U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SERIES P60-184, MONEY INCOME OF HOUSEHOLDS, FAMILIES, AND PERSONS IN THE UNITED STATES: 1992 (1993)). In addition, for every dollar earned by white men, black men earned seventy-two cents, black women sixty-four cents, Hispanic men sixty-five cents, and Hispanic women fifty-five cents. These figures vary slightly from study to study. For example, figures provided by the Federal Office of Personnel Management showed women in the professional classification category earning eighty percent of male earnings and women in the administrative classification category earning eighty-four percent. *Hearings, supra* note 3 (statement of John Sturdivant, National President, American Federation of Government Employees before the House Subcommittee on Select Education and Civil Rights concerning the Fair Pay Act).

males.[117] Moreover, additional job experience pays at a rate of $1.20 per hour for white males, while only paying thirty-five cents for black women, thirty cents for white women, and twenty-five cents for Hispanic women.[118] Furthermore, these statistics may underestimate overall gender disparities, because less than half of the women work full-time for a full year and a disproportionate number lack employment-related benefits such as health coverage and pensions.[119] According to advocates of the Fair Pay Act, women individually lose over $420,000 during a lifetime due to pay inequity[120] and women as a group lose over $100 billion annually.[121] At current rates, under current legislation, proponents of comparable worth predict it will take between seventy-five and 100 years to achieve a balanced workplace.[122]

B. "It's the Market"

The market excuse can be subdivided into two categories. First, both opponents and courts argue that wage disparities are the result of the free market, not latent or patent discrimination.[123] These opponents of comparable worth argue that the free market accurately reflects the worth of an individual occupation. They contend comparable worth legislation would superficially alter the supply and demand curve.[124] Without voluntary, free exchange by independent employers there could only be dictated trade.[125] In addition, these opponents note that comparability of jobs and wages fails to take intrinsic, nonmonetary benefits into consideration, such as the working conditions of a particular occupation.

Norton argues that the consideration of nonmonetary benefits only widens the wage disparity gap, because women often do not receive comparable health coverage and pension benefits, whereas opponents of comparable worth focus more on the lay person's definition of "working conditions." Working conditions under a comparable worth analysis, however, are defined, as in Title VII,

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117. *Hearings, supra* note 3 (statement of Michele Leber, Treasurer, National Committee on Pay Equity) (quoting U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, SERIES P60-184, MONEY INCOME OF HOUSEHOLDS, FAMILIES, AND PERSONS IN THE UNITED STATES: 1992 (1993)).

118. *Id.* (quoting INSTITUTE FOR WOMEN'S POLICY RESEARCH, INCREASING WORKING MOTHER'S EARNINGS: THE IMPORTANCE OF RACE, FAMILY, AND JOB CHARACTERISTICS (1991)).

119. Rhode, *supra* note 21, at 1209.

120. *Hearings, supra* note 3 (statement of Michele Leber, Treasurer, National Committee on Pay Equity) (quoting WOMEN'S VOICES POLICY GUIDE: A JOINT PROJECT BY THE MS. FOUNDATION FOR WOMEN AND THE CENTER FOR POLICY ALTERNATIVES (1992)).

121. *Id.* (quoting the National Committee on Pay Equity's calculation of the total wage gap, based on 1992 U.S. Census Bureau Data).

122. 2 UNITED STATES COMM'N ON CIVIL RIGHTS, COMPARABLE WORTH: ISSUE FOR THE 80'S, at 109 (1984) (statement of Joy Ann Grune).

123. *See, e.g.*, Linda Chavez, *Fair Pay or Foul Play?*, USA TODAY, Aug. 3, 1994, at A9; Pincus, *supra* note 82, at 717-18.

124. Chavez, *supra* note 123, at A9; Pincus, *supra* note 82, at 717-18.

125. Chavez, *supra* note 123, at A9; Pincus, *supra* note 82, at 717-18.

according to industrial relations standards, in terms of safety and hazards.[126] Some opponents of comparable worth argue that a lay person's definition of working conditions—including friendships and sociability, schedule flexibility, job status, and emotional significance—are ignored by a comparable worth analysis.[127]

Second, some opponents of comparable worth argue that the problem is not the ineffectiveness of current legislation, but the failure of women to take advantage of such legislation by making less of an investment in their careers and focusing instead on their families.[128] They point to figures which show that women earn more than men when they dedicate themselves to a full-time position.[129] This argument, however, merely describes the job market and does not attempt to explain the underlying reasons for the failure of women to enter male-dominated occupations or work full-time, choosing instead to focus more on family and child rearing. Although an in-depth analysis of all the socioeconomic and psychological reasons for the failure of women to enter male-dominated occupations is beyond the scope of this Note, two general categories illustrate this point.

First, women are barraged with definite cultural expectations throughout their lives. Although these expectations have changed over the past forty years, preconceived notions about "women's work" persist. The absence of female role models may also aggravate the problem.[130] Women remain largely outside the network of support, guidance, and information exchange.[131] Families encourage job choices that will not conflict with domestic duties, require geographic mobility, or entail greater prestige or income for wives than for husbands.[132] This is especially true among minority groups, the groups already most disadvantaged by existing occupational structures.[133] Low expectations become self-fulfilling prophecies. In light of the wage disparities, and the difficulty women have

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126. *See* Corning Glass Works v. Brennan, 417 U.S. 188, 202 (1974).

127. Mathys & Pincus, *supra* note 112, at 353. This argument relates to the second market excuse category, that women freely choose to remain in female-dominated job classifications.

128. *Id.* at 354-56.

129. For example, statistics from the U.S. Department of Labor, Women's Bureau, show full-time working women making more than men in certain occupations:

Full-time Working Women Earnings in Selected Occupations as a Percentage of Men's Earnings

Occupation	1983	1993
Registered nurse	99.5	101.5
Cashiers	84.3	87.7
Guards, except public service	91.2	95.9
Mechanics/repairers	89.4	106.7

Chavez, *supra* note 123, at A9.

130. Thomas Huang, *Getting His Housekeeping In Order*, THE DALLAS MORNING NEWS, Oct. 12, 1994, at C1.

131. Rhode, *supra* note 21, at 1221.

132. *Id.* at 1214.

133. *Id.*

entering the male-dominated job market, economically it often makes more sense for the couple to invest in the husband's career.[134]

Second, women are still subjected to intentional discrimination. As evidenced in clinical and longitudinal studies, this intentional discrimination results from outdated statistical information about female job performance and unconscious stereotypes.[135] For example, if an employer believes female workers have a higher turnover rate than males, and it is difficult to screen for true job commitment in advance, it makes sense for the employer to channel women toward low-status, low-paid positions where they are easily replaced. Although recent data suggest men and women holding comparable jobs do not have different turnover rates, the residual effects of statistical discrimination persist.[136]

Opponents of comparable worth argue that even if these reasons are probable or supported by statistical data, comparable worth legislation seems an ill-suited remedy. Rather than prevent or discourage segregation into male-dominated and female-dominated occupations, opponents argue comparable worth aggravates segregation by providing equal pay.[137] While comparable worth is admittedly limited to pay discrimination, it is also concerned with sex discrimination in general. By increasing the pay of female-dominated occupations, comparable worth legislation discourages women from entering male-dominated occupations and results in increased segregation. Women must enter male-dominated occupations to become role models for future generations and to erode stereotypes.

Indeed, the increase of women in law, medical, and business school indicates cultural expectations are having less effect on occupational choices.[138] For example, in 1964 forty-two percent of degrees earned by women were in education.[139] In 1981, that figure declined to eighteen percent.[140] In 1964, women received only five percent of the law, medical and business degrees conferred.[141] In 1984, thirty percent of law degrees, twenty-five percent of medical degrees, and twenty-five percent of business degrees were earned by women.[142] Although the transformation will take time, opponents insist traditional methods will inevitably lead to more women in upper management, where they will be able to effect

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134. *Id.* at 1216.

135. *See, e.g.*, Caribbean Marine Serv. Co. v. Baldridge, 844 F.2d 668, 671, 675 (9th Cir. 1988) (fishing boat owners stated that if women were on board it would hurt morale, distract the crew, and reduce the catch); *see also* J. LYLE & J. ROSS, WOMEN IN INDUSTRY 8, 9-10 (1973). Note also that fear of sexual harassment may discourage women from entering male-dominated occupations. Rhode, *supra* note 21, at 1221.

136. Rhode, *supra* note 21, at 1219.

137. *Id.*, at 1232.

138. *See generally* Mathys & Pincus, *supra* note 112, at 355.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* The 1993 statistics for Indiana University School of Law—Indianapolis further illustrate this point, with females comprising 40% of the school's enrollment. INDIANA UNIVERSITY SCHOOL OF LAW-INDIANAPOLIS BULLETIN 1994-1996 (1994).

policy, act as role models, and establish a female network for future generations.

C. "Who Determines Worth?"

Opponents argue that it is impossible to assign a value to a particular occupation.[143] They point to the numerous examples of wage gaps in male-dominated occupations that also seem unfair, like wage disparities between professional baseball players and college professors or between presidents of large corporations and the President of the United States. Even jobs that require equal levels of education and skill, and have similar working conditions, often vary widely in pay. Engineers and architects, for example, have similar training, skills, and working conditions, yet engineers usually earn more than architects.[144]

Opponents of comparable worth use such examples to illustrate wage disparity as an inevitable part of the free market.[145] Comparable worth, as discussed in this Note and as proposed by the Fair Pay Act, however, is concerned only with wage disparities of a single, specific employer.[146] Engineers would not be compared to architects. Moreover, engineers working for Company A would not be compared to engineers working for Company B. Company A would only have to pay its engineers as much as other Company A employees doing equivalent work, the performance of which requires equal skill, effort, and responsibility, and which is performed under similar working conditions.[147]

Employers are free to establish any evaluation criteria, so long as they apply these criteria equally to both male-dominated and female-dominated occupations.[148] The employer can pay everyone the same, pay different rates for work of lesser value, pay more for managerial skills, pay more for creative skills, or emphasize responsibility over skill.

The Fair Pay Act's use of employer-designated evaluation criteria is not the only possibility under a comparable worth system. Other systems involve the government or government-appointed committees in establishing evaluation

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143. Mathys & Pincus, *supra* note 112, at 352-54 (stating that pay is only one motivation for people to accept a position or desire a particular career, with other motivations including fringe benefits, job security, social satisfaction, and recognition by one's supervisor); Fischel & Lazear, *supra* note 112, at 893-94 (value of a job can be determined only by reference to the wage that prevails in the market as a result of supply and demand); Rhode, *supra* note 21, at 1231 (an evaluation system that considers only job content might make it difficult for employers to attract and retain workers in areas of tight labor supply and distort signals to potential employees about labor needs).

144. Clauss, *supra* note 13, at 20.

145. *See supra* note 143.

146. H.R. 4803, 103d Cong., 2d Sess. § 3 (1994).

147. *Id.*

148. An employer may still be subject to liability under a disparate impact Title VII claim if the employment criteria has an adverse impact on a protected group. McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973).

criteria.[149] The former is known as "policy capturing" and the latter "a priori."

"A priori" evaluation systems utilize governmental standards or standards imposed by government-appointed committees, instead of using the employer's own evaluation criteria.[150] These evaluation procedures are not likely to recognize the specialization inherent in many occupations. "A priori" systems are likely to overlook the relative size of an employer, particular business nuances, and local economic considerations. Furthermore, "a priori" evaluation systems would likely be deemed too intrusive into the workings of private employers.

"Policy capturing" systems would likely be used under the Fair Pay Act.[151] "Policy capturing" systems permit the employer to establish its own evaluation criteria or utilize a system already in place.[152] This reduces the cost to employers of implementing and learning a new job evaluation system and minimizes disruption of same-sex job rankings.[153] After the employer determines its evaluation system, a regression analysis is used to detect and eliminate biases.[154] Only factors that are also used in male-dominated occupations or mixed

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149. Fischel & Lazear, *supra* note 112, at 896 (comparing mediocre bankers with brilliant artists); Mathys & Pincus, *supra* note 112, at 356 (comparing engineers with nurses); Chavez, *supra* note 123, at A9 (comparing brain surgeons and professional baseball players); Rhode, *supra* note 21, at 1229-30 (citing job comparisons using an intrinsic, "a priori" evaluation system).

150. Rhode, *supra* note 21, at 1229-30.

151. H.R. 4803, 103d Cong., 2d Sess. § 3 (1994).

152. Studies show that approximately two-thirds of all employers have already established some formal evaluation procedure. Rhode, *supra* note 21, at 1228.

153. Clauss, *supra* note 13, at 11-12.

154. In order to establish an evaluation procedure, the employer must set up an evaluation system. The evaluation system will rank groups of jobs on the basis of a common set of job factors. Clauss, *supra* note 13, at 49 (quoting REPORT OF WISCONSIN'S TASK FORCE ON COMPARABLE WORTH 34, 196 (Jan. 1986)). Thus, the employer must first determine which factors it will use. *Id.* The factors will vary depending on the nature of the work and the person doing the evaluation, but will typically include some variant of skill, effort, responsibility, and working conditions. *Id.* Once the factors are determined, they are divided into levels. *Id.* Each level has an increased degree of worth, and often includes language identifying the requisite mastery for a particular level. *Id.* For example, a Wisconsin pay equity study used knowledge as one of its requirements, with the requisite level one mastery defined as "[l]anguage skills sufficient to follow oral instructions and [s]kills necessary to perform simple manual tasks . . . ." *Id.* Next, weights are assigned to each factor, because some factors will be valued more than others. *Id.* at 50. Finally, the employers analyze the jobs in relation to the factors and weights, and decide which factor level accurately describes each job. *Id.* at 50-51. This process is often done by either a job evaluator, personnel director, or job evaluation committee, using interviews, position descriptions, and on-site inspections. *Id.* at 51.

The regression analysis is then performed by plotting the wage rates for male-dominated and female-dominated jobs at each point level. The employer then draws a line of best fit for male-dominated and integrated jobs and a line of best fit for female-dominated jobs. If the lines overlap, there is no evidence of sex bias. If they do not overlap, however,.there is substantial evidence of gender-based wage disparity. *Id.*

occupations are then used to compare the female-dominated occupations.

Still, "policy capturing" is not without problems of its own. By permitting the employer to determine its own evaluation criteria, bias already existent in the company is given governmental approval and seemingly scientific validity.[155] Relevant job factors could be omitted, some jobs could be inaccurately described, and jobs could be assigned to the wrong factor level.[156]

D. "Too Costly"

Assuming that the problem is real and the Fair Pay Act could be effectively implemented, many employers are concerned with the costs of establishing and maintaining an evaluation system and the costs of an increased payroll.[157] Aside from the numerous record keeping and reporting costs, employers will have to raise the pay of female-dominated occupations to comply.[158] Opponents of comparable worth estimate a five percent increase in an employer's total payroll.[159] Proponents argue that those cost estimates are likely exaggerated, but assuming that they are accurate, the costs are justified.[160] Potential benefits outweigh costs and employers can implement programs gradually and spread costs over time.[161]

IV. COMPARABLE WORTH APPLIED

The term "comparable worth" has developed more into a concept than a specific legal program. Since its original inception, it has been altered into a variety of theories and approaches, all of which are based upon disputed data and arguably speculative results. Like its predecessors, the Equal Pay Act and Title VII, its likely impact on the national economy and wage disparities is unknown. Nevertheless, like many controversial legislative proposals, comparable worth legislation has had trial runs in various states, municipalities, and other countries.

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155. Rhode, *supra* note 21, at 1239-40. For example, this difficulty was ironically highlighted by Robert M. Tobias, President of the National Treasury Employees Union, when he testified in support of the Fair Pay Act. Mr. Tobias called the federal job classification system fundamentally flawed because it reflects historical biases in its weights and classification standards. *Hearings, supra* note 3 (statement of Robert M. Tobias, President, National Treasury Employees Union).

156. Clauss, *supra* note 13, at 179; *see also* Mark Seidenfeld, *Some Jurisprudential Perspectives on Employment Sex Discrimination Law and Comparable Worth*, 21 RUTGERS L.J. 269, 319-21 (1990). The Fair Pay Act reduces this risk by requiring the employer to submit an annual report of its pay determinations, which will then be available to its employees and the public at large. H.R. 4803, 103d Cong., 2d Sess. (1994).

157. Rhode, *supra* note 21, at 1232.

158. Pincus, *supra* note 82, at 715.

159. Kathleen Weaver, *Comparable Worth in the United States and the Canadian Province of Ontario*, 14 B.C. INT'L & COMP. L. REV. 137, 138 (1991).

160. *Id.*

161. Rhode, *supra* note 21, at 1234 (noting similar unwarranted fears over minimum wage and child labor laws); Clauss, *supra* note 13, at 91.

These entities act as laboratories, experimenting with different mixtures of the comparable worth theory in different environments. When the broad ideology of comparable worth is attached to a concrete plan or piece of legislation, only then is it possible to examine its potential benefits and shortcomings.

A. San Jose, California

San Jose, California was one of the first cities in the United States to implement a comparable worth system. In 1980, the city conducted a wage evaluation of nonmanagement jobs.[162] The study indicated the existence of wage disparities. In July 1981, in reaction to the survey results, AFSCME Local 101 went on strike to force the city to implement a comparable worth system for the 4000 workers employed by the city.[163] After two weeks, the city agreed to a settlement of $1.45 million to be allocated over two years for comparable worth adjustments.[164] Wages were adjusted for the fifty-eight percent of female dominated job titles that deviated most from the evaluation.[165] About 809 workers, or twenty percent of the city's employees, were affected.[166] Adjustments came again in 1981, 1982, 1983, and 1984, although not all jobs were adjusted every year.[167]

The results were impressive. Over a period of six years, the average weekly wage for targeted jobs rose by 74%, compared to 50% for nontargeted jobs.[168] These increases were not due to other economic factors, such as a general overall increase in clerical workers.[169] The annual Area Wage Survey indicated that the wages in government positions rose faster than wages in similar positions in San

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162. Shulamit Kahn, *Economic Implications of Public-Sector Comparable Worth: The Case of San Jose, California*, 31 INDUSTRIAL RELATIONS 270, 274 (1992).

163. *Id.*

164. Andrea Giampetro-Meyer, *Resurrecting Comparable Worth as a Remedy for Gender-Based Wage Discrimination*, 23 SW. U. L. REV. 225, 234 (1994).

165. Kahn, *supra* note 162, at 274.

166. *Id.*

167. *Id.*

168.

Average Weekly Wages in San Jose City Government

	July 1980	July 1986	Percentage change
Targeted Jobs:	$268.3	$466.6	73.9%
Nontargeted jobs:			
Total	422.8	636.0	50.4
AFSCME	340.7	526.6	54.6
Police/Fire	462.0	684.4	48.1
Other Union	353.7	548.7	55.1
Management	631.4	920.6	45.8

Id. at 275 (citing the City of San Jose Personnel Department Statistics).

169. *Id.* at 277.

Jose's private sector.[170] In addition, San Jose experienced faster growth than neighboring governments that had not implemented a comparable worth plan.[171] Finally, although wages in San Jose's targeted jobs were originally lower than those in neighboring cities, by 1986 the salaries met and exceeded neighboring cities.[172] Contrary to the fears of some economists, government employment grew 15.5% in San Jose from 1980 to 1984, over 10% faster than city governments in twelve of California's largest cities.[173]

Nevertheless, the San Jose experience may be atypical. The city had a strong commitment to comparable worth and to hiring and retaining female employees. This enthusiasm seems less likely if comparable worth is imposed by national legislation. In addition, like most state programs,[174] San Jose's comparable worth plan applied only to governmental employees.

B. Minnesota

The State of Minnesota has enacted the most wide-spread government employer comparable worth policy in the United States.[175] In 1982, Minnesota enacted the State Employees Pay Equity Law.[176] The Minnesota law allowed for adjustments over five years and relied on collective bargaining to make salary adjustments.[177] No jobs received salary decreases and increases were made only where evaluations indicated wage disparities.[178] Nevertheless, although state employees received pay increases, the legislation created shortages in some occupations and state salaries still lagged far behind comparable jobs in the private sector.[179]

C. Ontario, Canada

Canada has also been a pioneer in comparable worth legislation. In 1977, Canada passed the Canadian Human Rights Act.[180] Although the Human Rights Act only applied to eleven percent of the population, it required Canadian provinces to enact their own legislation.[181] In 1990, Ontario passed the Ontario

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170. *Id.*

171. *Id.* at 276-77.

172. *Id.*

173. *Id.* at 277.

174. *See infra* Part IV.B. (Minnesota system); *see also* Giampetro-Meyer, *supra* note 164, at 234 (Washington system).

175. Giampetro-Meyer, *supra* note 164, at 235.

176. MINN. STAT. ANN. § 43A.01(3) (West 1988).

177. Giampetro-Meyer, *supra* note 164, at 235.

178. *Id.*

179. Chavez, *supra* note 123, at A9.

180. Canadian Human Rights Act, R.S.C., ch. 33, § 11 (1985) (Can.); Weaver, *supra* note 159, at 147.

181. Weaver, *supra* note 159, at 147.

Pay Equity Act ("Ontario Act"). [182] The Ontario Act was the most progressive legislation in Canada. Like the proposed Fair Pay Act, it applies a proactive comparable worth plan to both private and public employers.[183]

In several important aspects, however, the Ontario Act is distinct from the Fair Pay Act. First, unlike the Fair Pay Act, the Ontario Act provides a narrow exception that permits an employer to increase wages when there is a shortage of a particular skill in the market.[184] Second, unlike the Fair Pay Act, the Ontario Act permits employers to stagnate or "red-circle" employee wages that the employer then considers overvalued.[185] This helps the employer reduce the overall implementation costs of comparable worth.[186] The Fair Pay Act prevents reducing wages and has no exceptions for overvalued occupations.[187] Third, the Ontario Act is being implemented gradually over a six year period.[188] In contrast, the Fair Pay Act seemingly would require immediate implementation. Public sector employers are required to make the first adjustments, followed next by large private firms, and then by small private firms.[189] Finally, the Ontario Act has penalty caps whereas the Fair Pay Act has none.[190] An employer's maximum liability under the Ontario Act is $2,000 for individual claims and $25,000 for all other claims.[191] The caps are indicative of Ontario's cooperative approach to implementing a comparable worth system. The penalty caps motivate employers to educate themselves, but do not punish employers who are still attempting to correct disparities that have existed in their companies for decades.

In other aspects, the Ontario Act parallels the Fair Pay Act. First, like the Fair Pay Act, the Ontario Act allows for narrow exceptions based on seniority and

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182. *Id.* at 149.

183. *Id.*

184. *Id.*

185. *Id.* at 152.

186. *Id.*

187. The Ontario Act uses four steps. First, employers must determine the number of plans for their organizations. This is determined by looking at the number of employees and grouping them according to geographic location, taking into account bargaining and non bargaining units. *Id.* at 150. Second, the employer must determine which occupations are male-dominated and female-dominated, and which occupations are comparable when considering duties, responsibilities, requisite qualifications, compensation schedules, salaries, grades or ranges of salary rates, and employment recruitment methods. *Id.* Third, the employer must apply a method of comparison. *Id.* The method is left to the discretion of the employer, so long as it is appropriate. *Id.* at 151. The Ontario Act, like the Fair Pay Act, forbids decreases in male salaries. *Id.* at 151-52. The Ontario Act allows for gradual periodic adjustments and has five exceptions to the pay equity requirement: formal seniority system, temporary employment training assignment available to both males and females, merit system, decrease for overvalued occupations, and skill shortages resulting in a temporary increase in compensation. *Id.* at 152.

188. *Id.* at 149.

189. *Id.*

190. *Id.* at 153.

191. *Id.*

merit.[192] Second, the Ontario Act, like the Fair Pay Act, allocates funds for educating employers about the goals and theories of comparable worth.[193] In addition to investigating claims, the Ontario Pay Equity Office develops educational materials, seminars, and workshops.[194] Third, the Ontario Act, like the Fair Pay Act, permits individual employees or groups of employees to file a complaint.[195] Currently, under Title VII, employees must file complaints with the Equal Employment Opportunity Commission.[196] The Commission's failure to pursue claims in the past four years makes this an attractive procedural advantage and is one of the strongest attributes of both the Ontario Act and the Fair Pay Act.

The Ontario Act is the first wide-scale implementation of a public and private comparable worth system that is similar to the proposed Fair Pay Act. The Ontario Act should serve as a model for similar legislation in the United States. In addition, over 700 American businesses have offices in Canada that will be exposed to the Ontario Act, providing a unique opportunity to introduce American businesses to the benefits and detriments of comparable worth on a reduced scale.[197]

V. REACTION OF THE POPULAR MEDIA

Because passage of the Fair Pay Act will inevitably require at least some

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192. *Id.* at 150.

193. Section seven of the Fair Pay Act states:

> The Equal Employment Opportunity Commission shall undertake studies to provide information and technical assistance to employers, labor organizations, and the general public concerning effective means available to implement the provisions of section 6(g) prohibiting wage discrimination between employees performing work in equivalent jobs on the basis of sex, race, or national origin. Such studies, information, and technical assistance shall be based upon and include reference to the declared policy of such section to eliminate such discrimination. In order to achieve the purposes of such section, the Equal Employment Opportunity Commission shall further carry on a continuing program of research, education, and technical assistance including—
>
> (A) undertaking and promoting research . . . ;
>
> (B) publishing and otherwise making available to employers, labor organizations, professional associations, educational institutions, the various media of communication, and the general public findings of studies and other materials for promoting compliance with section 6(g);
>
> (C) sponsoring and assisting State and community informational and educational programs; and
>
> (D) providing technical assistance . . . .

H.R. 4803, 103d Cong., 2d Sess. §7 (1994).

194. Weaver, *supra* note 159, at 153.

195. *Id.* at 153; R.S.C. ch. 34, § 22 (1987); *Cf.* H.R. 4803, 103d Cong., 2d Sess. § 5 (1994).

196. 42 U.S.C. § 2000e-5 (1994).

197. *Hearings, supra* note 3 (statement of Michele Leber, Treasurer, National Committee on Pay Equity).

broad-based public support, it is worthwhile to summarize at least the initial, cursory reaction in the popular media. Unfortunately, the bill was largely overwhelmed in the 103d Congress and was never subjected to serious public debate. Most of the information that was published appears to have been disseminated by proponents, perhaps anticipating an uphill battle.

A columnist for *USA Today* cited recent polls showing that the number one issue for American women is pay equity, not wife beating or abortion coverage in health care plans.[198] Citing Norton's inequity statistics, the article highlighted the inability of job seekers to obtain even the simplest data from employers, while employers utilize intrusive investigative measures like interviewing an applicant's neighbors, drug screening, and credit reports when considering applicants.[199]

A columnist for the *Washington Post* cited a 1991 study, conducted by Democratic pollster Celinda Lake, that found seventy-seven percent of registered voters supported a law requiring the same pay for men and women in jobs requiring similar skills and responsibilities.[200] Furthermore, the article cited a study by Deborah Figart, a professor of economics at Eastern Michigan University, and June Lapidus, an instructor at Roosevelt University in Chicago, which illustrated that pay equity, not welfare reform, will improve the lot of the working poor.[201] Otherwise, the study noted that former female welfare recipients entering the job market will merely join the sixty-two percent of working poor women holding underpaid female-dominated jobs, the very jobs targeted by the Fair Pay Act.[202] The study also indicated that if a comparable worth system was implemented, poverty among women in clerical or clerical-support jobs, for example, would decrease by seventy-four percent.[203]

Other columnists reminded the public of similar legislation that failed in the Reagan years, which was then dubbed "the looniest idea since Looney Toons."[204] Unfortunately, these articles typically involved misinformation about the specifics of the Fair Pay Act, like criticizing the bill for attempting to assess the intrinsic value of jobs and trying to compare jobs between different employers.[205] The Fair Pay Act does neither.[206] If proponents want eventual passage, they must disseminate accurate information about the bill and squelch any confusion about

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198. Martha Burk, *After 30 Years, Let's Enforce Pay Equity*, USA TODAY, July 21, 1994, at A8.

199. *Id.*

200. Judy Mann, *Doing What's Fair on Payday*, WASHINGTON POST, July 15, 1994, at E3.

201. *Id.*

202. *Id.*

203. *Id.*

204. Francine G. Hermelin, *Legislating Fair Pay; Proposed Fair Pay Act; 16th Annual Salary Survey: 1995*, 20 WORKING WOMAN 34, 34 (1995).

205. *See, e.g.*, Keith Epstein, *Working Women Building Support for Fair-Pay Law: U.S. Chamber of Commerce Vows Stiff Fight*, PLAIN DEALER, June 5, 1994, at A1 (comparing librarians to engineers and pilots to typists); Chavez, *supra* note 123, at A9 (using an "a priori" system and comparing brain surgeons to major-league baseball players).

206. *See generally* H.R. 4803, 103d Cong., 2d Sess. (1994).

the bill's particulars, especially its evaluation procedures.

CONCLUSION

The Fair Pay Act did not pass in the 103d Congress. Issues like national health care and the crime bill took precedent and the bill never even got out of committee. This term its success looks even more bleak. All but one of the former co-sponsors were democrats, most of whom are now out of office.[207] What looked like an uphill battle in the 103d Congress may prove an impossible battle in the new Congress.

Fairness is a lofty and admirable goal. Perhaps with time, some of the American businesses in Ontario will become supporters of pay equity legislation in the United States. Moreover, with national attention now focusing on the welfare system, the government will likely look for innovative solutions to resolve the nation's ills. Self-sufficiency can hardly suffice if the jobs unemployed women obtain still keep them below the poverty line. If the pay equity laws in Canada prove inexpensive or even profitable, perhaps passage of the Fair Pay Act will allow welfare-dependent women to enter the job market and earn enough to support themselves and their families. Comparable worth must be re-examined with an eye toward the future and the Fair Pay Act should serve as the catalyst for such an examination.

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207. The bill's original co-sponsors in the House included: Brown D-FL, Collins D-MI, Dellums D-CA, Gonzalez D-TX, Green D-TX, Hinchey D-NY, Johnson, E.B. D-TX, Kennelly D-CT, Maloney D-NY, Margolies-Mezvinsky D-PA, Martinez D-CA, McCloskey D-IN, McKinney D-GA, Mineta D-CA, Nadler D-NY, Owens D-NY, Roybal-Allard D-CA, Schroeder D-CO, Serrano D-NY, Tucker III D-CA, and Velazquez D-NY.

In addition, Edwards D-CA, Filner D-CA, Frank D-MA, Hastings D-FL, Lowey D-NY, Mink D-HI, Unsoeld D-WA, and Watt D-NC, were added on July 28, 1994. Andrews D-NJ, Gilman R-NY, and Pastor D-AZ, were added on August 10, 1994.

The bill was reintroduced in the 104th Congress, received support from 28 additional co-sponsors in the House as H.R. 1507, and was introduced in the Senate by Tom Harkin, D-IA, as S. 1650 with eight co-sponsors as of April 15, 1996.

A STATE STATUTORY PRIVILEGE FOR ENVIRONMENTAL AUDITS: IS IT A SUIT OF ARMOR OR JUST THE EMPEROR'S NEW CLOTHES?

MICHAEL T. SCANLON*

INTRODUCTION

Environmental protection concerns have resulted in the enactment of a multitude of statutes and regulations in such diverse areas as air pollution, water pollution, hazardous waste management, underground storage tanks, polychlorinated biphenyls (PCB) management, liability under Superfund to remediate waste sites, pesticide management, and many others.[1] Failure of companies and individuals to abide by these statutes and regulations has resulted in significant civil and criminal penalties at the federal level.[2] Therefore, decision-makers within regulated entities must act to ensure compliance. The presence of regulatory agencies at all levels of government with inspection and enforcement authority require ongoing environmental compliance. To reduce the potential for enforcement action, regulated entities must be able to recognize and address deficiencies before the government identifies them.

For these reasons, a procedure is needed to monitor and enhance compliance with environmental regulations. One such method is the environmental audit.[3] Environmental auditing is a functional and effective tool by which compliance with this myriad of regulations can be evaluated.[4] Not only does it allow regulated entities to monitor their operations in light of regulatory requirements, but it can also assist in assessing their position in light of internal goals that may surpass

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1. THOMAS H. TRUITT ET AL., ENVIRONMENTAL AUDIT HANDBOOK 8 (2d ed. 1983). *See generally* Michael H. Levin et al., *Discovery and Disclosure: How to Protect Your Environmental Audit Report*, [24 Current Developments] Env't Rep. (BNA) 1606, 1606 (Jan. 7, 1994) (asserting that audits are essential to proactive environmental programs to bring facilities into compliance with environmental laws).

2. In fiscal year 1994, 2,249 federal enforcement actions were brought against individuals and companies regarding the violation of environmental statutes and regulations. This is over 100 more actions than were taken in 1993 by the Environmental Protection Agency (EPA) or Department of Justice and a 28% increase in the number of actions brought in 1991. In 1994, record fines totaling $165.2 million, including civil fines of $128.4 million and a record $36.8 million in criminal fines, were collected. Although not guaranteeing records for 1995, the EPA intends to continue a vigorous enforcement program. *Environmental Agency's Activities in FY 1994 Break Records for Actions Pursued, Fines Levied*, [18 Current Reports] Chem. Reg. Rep. (BNA) 1316, 1316-17 (Dec. 2, 1994).

3. *Environmental Audits Provide an Extra Check*, CHEMECOLOGY, Nov./Dec. 1994, at 5.

4. *See* TRUITT ET AL., *supra* note 1, at 8-10.

mere compliance.[5] Further, failure to perform an audit can expose a company to increased liability should an accident occur.[6]

According to the United States Environmental Protection Agency (EPA), "[e]nvironmental auditing is a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements."[7] Audits can be structured to accomplish various objectives, such as enabling a regulated entity to "verify compliance with environmental requirements; evaluate the effectiveness of environmental management systems already in place; or assess risks from regulated and unregulated materials and practices."[8] It can focus on an individual medium, such as air pollution, water pollution, or waste management; or it can be an analysis of multiple media or existing management programs designed to maintain compliance.[9] The EPA has identified a number of elements that are usually found in an effective environmental auditing program, including support by management, an independent auditing team, training, and specific auditing objectives.[10]

Audits serve a variety of purposes, including compliance assessments, site

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5. *See generally Environmental Audits Provide an Extra Check*, *supra* note 3, at 5 (identifying two companies whose audits go beyond mere compliance).

6. *Prosecutor Says Environmental Audits Have Become 'Essential Business Practice,'* [25 Current Developments] Env't Rep. (BNA) 987, 987 (Sept. 16, 1994) ("Environmental Audits now are an 'essential business practice' and a reasonable 'standard of care,'" and, therefore, may need to surpass merely determining the compliance status.) (quoting James Sevinski, Chief, Environmental Protection Bureau, New York Attorney General's Office, speaking at the ABA Annual Environmental Conference (August 8, 1994)).

7. Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004, 25,006 (1986) (footnote omitted).

8. *Id.*

9. Paulette Mandelbaum, *Self-Audits Befitting Your Facility*, ENVTL. PROTECTION, Nov. 1994, at 32, 34.

10. Environmental Auditing Policy Statement, *supra* note 7, at 25,009. The general elements which EPA identified are:

> [1] [e]xplicit top management support for environmental auditing and commitment to follow-up on audit findings . . . .
>
> [2] [a]n environmental auditing function independent of audited activities . . . .
>
> [3] [a]dequate team staffing and auditor training . . . .
>
> [4] [e]xplicit audit program objectives, scope, resources and frequency . . . .
>
> [5] [a] process which collects, analyzes, interprets and documents information sufficient to achieve audit objectives . . . .
>
> [6] [a] process which includes specific procedures to promptly prepare candid, clear and appropriate written reports on audit findings, corrective actions, and schedules for implementation . . . .
>
> [7] [a] process which includes quality assurance procedures to assure the accuracy and thoroughness of environmental audits.

Id.

assessments, and many others.[11] Audits used to determine a regulated entity's compliance with environmental regulations must be structured to meet the specific needs of that entity.[12]

The first step in an audit is to determine its scope.[13] Subsequent steps include: ensuring that facility personnel cooperate during the audit; determining who will participate on the audit team; determining the applicable regulations and deciding which aspects of the company to audit; collecting information about the entity; analyzing the results; preparing a report; and finally, reviewing the audit itself.[14]

When an environmental audit identifies areas of noncompliance, prompt and efficient problem recognition and resolution can reduce the liability associated with noncompliance. Conversely, a well-documented audit can provide regulatory agencies or other parties with a guide to specific areas of noncompliance during an enforcement or civil action.[15] The Federal Rules of Civil Procedure generally allow the parties in a dispute to obtain, through discovery, any relevant information,[16] including information that otherwise would not be admissible if that information could "reasonably . . . lead to the discovery of admissible evidence."[17] If the environmental audit contains any information that would be relevant in a subsequent action, the federal rules allow it to be subject to discovery.[18] Therefore, protecting this information is critical to an entity's defense in subsequent legal actions,[19] and thus, the environmental audit must be carefully planned so that confidentiality can be preserved.[20] Besides specific statutory privileges, other mechanisms exist that may shield audits from discovery, including the attorney-client privilege, the work product doctrine, the self-evaluation privilege, and various governmental agency policies. However, the

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11. Mandelbaum, *supra* note 9, at 32-35.

12. *See* TRUITT ET AL., *supra* note 1, at 80.

13. *Id.* This includes determining whether the audit will be comprehensive or limited in scope. *Id.* at 84-85. The scope will be impacted by financial issues as will the decision of whether the audit will be performed by a consultant or by facility personnel and whether the audit report will include an analysis of the costs to return to compliance, if any violations are identified. *Id.* at 89. See generally *id.* at 80-163 for a discussion of conducting an audit.

14. *Id.* at 80. *See* Matthew P. Weinstock, *Environmental Auditing: A Measure of Safety*, OCCUPATIONAL HAZARDS, May 1993, at 73, 75 (identifying important elements in an audit program).

15. *See* Levin et al., *supra* note 1, at 1606. *See also* James T. O'Reilly, *Environmental Audit Privileges: The Need for Legislative Recognition*, 19 SETON HALL LEGIS. J. 119, 119, 131 (1994).

16. FED. R. CIV. P. 26(b)(1). *See* TRUITT ET AL., *supra* note 1, at 33 (discussing Rule 26(b)(1)).

17. FED. R. CIV. P. 26(b)(1). *See* TRUITT ET AL., *supra* note 1, at 33-34.

18. TRUITT ET AL., *supra* note 1, at 34.

19. *See id.* at 32.

20. *Id.* at 33 ("[T]he environmental audit must from the outset be planned and conducted with meticulous regard for the requisites of confidentiality if the company has determined that disclosure is undesirable.").

effectiveness of these other mechanisms is debatable.[21]

Notwithstanding the potential drawbacks, regulated entities still voluntarily perform audits. According to a survey by Price Waterhouse, seventy-five percent of responding companies, including nearly all of the largest companies surveyed, are currently performing environmental audits.[22] The survey also reported that outside groups had tried to obtain the audit information from twenty-five percent of the companies that were surveyed and fifteen percent stated that the attempts had succeeded.[23] Twelve percent of the respondents went on to state that voluntarily provided results "had been used against them in enforcement proceedings."[24] In addition, twenty percent of the responding companies that did not perform audits feared that the results of any future audits could be used against them.[25] Finally, almost two-thirds of the respondents that currently conduct audits would expand their programs if they could avoid penalties for areas of noncompliance that they identify, report, and correct.[26]

The voluntary review of an entity's performance is essential to improve compliance with environmental regulations.[27] However, this benefit is threatened by the difficulty in concealing the audit's results from discovery. In response to this situation, Arkansas, Colorado, Idaho, Illinois, Indiana, Kansas, Kentucky, Minnesota, Mississippi, Oregon, Texas, Utah, Virginia, and Wyoming have enacted legislation designed to promote voluntary environmental audits by protecting the reports from discovery in subsequent proceedings.[28]

Part I of this Note analyzes the privilege created by the various state statutes. Part II discusses other privileges and doctrines that might be utilized by regulated entities to protect information in environmental audits. Part III discusses policies established by the EPA and the Department of Justice (DOJ) regarding environmental audits. Part IV summarizes the protection provided by the states and discusses factors to consider in structuring an audit in light of these privileges. It also determines whether the statutes create an impenetrable suit of armor or merely the protective fabric used to craft the Emperor's new clothes.[29] Finally,

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21. *See infra* notes 242-98, 301-37 and accompanying text.

22. Stephen L. Kass & Jean M. McCarroll, *The Corporate Environmental Audit: Will EPA's New Policy Finally Level The Playing Field?*, ENVTL. PROTECTION, June 1995, at 45, 45-46. *See generally* Cheryl Hogue, *Audit Legislation Gains in States, But Some Predict Slowdowns in Future*, [26 Current Developments] Env't Rep. (BNA) 882, 882 (Sept. 1, 1995) ("Many companies are now conducting voluntary audits of their operations to determine their compliance with . . . regulations . . . .").

23. Kass & McCarroll, *supra* note 22, at 46.

24. *Id.*

25. *Survey: Auditing Discouraged by Penalty Threat*, ENVTL. REG. ADVISOR, July 1995, at 11.

26. *Id.*

27. Levin et al., *supra* note 1, at 1606.

28. *See infra* notes 30-239 and accompanying text.

29. HANS CHRISTIAN ANDERSEN, *The Emperor's New Clothes*, *in* ANDERSEN'S FAIRY TALES 199 (E.V. Lucas & H.B. Paull trans., 1945).

Part V concludes that the protection provided by the various state statutes is both limited and uncertain. Therefore, additional legislative protection should be provided to more uniformly shield the audits from discovery at both the state and federal level which should enhance compliance and protect the environment.

I. STATE STATUTES CODIFYING A PRIVILEGE FOR ENVIRONMENTAL AUDITS

As of August 1995, fourteen states had enacted legislation that provides a partial privilege from discovery for environmental audit documents.[30] In 1995, thirty-four of the forty-five states that did not already have an audit privilege law considered legislation to create the privilege.[31] The United States Congress has also considered enacting a statute in this area.[32]

Oregon was the first state to enact a statutory privilege for environmental audits.[33] Consequently, Oregon's legislation has become a model for many of the other states' statutes. Generally, the state statutes create a "qualified privilege for environmental audits."[34] In addition, some of the statutes have included a provision that grants either immunity from penalties or limits their extent.[35] This Note will discuss these state statutes by comparing their various provisions. Because Minnesota's statute is unique, its provisions will be discussed separately.

A. Purpose and Scope of the Statutes

The purpose of these statutes is to improve compliance with environmental regulations through self-assessment[36] that, in turn, protects the environment.[37] For

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30. The states are: Arkansas, Colorado, Idaho, Illinois, Indiana, Kansas, Kentucky, Minnesota, Mississippi, Oregon, Texas, Utah, Virginia and Wyoming. *See generally* Patricia E. O'Toole, *State Legislation on Audit Privilege*, ENVTL. F., May/June 1995, at 18, 18-19 (providing a brief discussion of the various statutes and identifying other legislation).

31. Hogue, *supra* note 22, at 882. *See generally* O'Toole, *supra* note 30, at 18-19 (identifying the status of various state legislation).

32. S. 582, 104th Cong., 1st Sess. (1995). *See generally* Mark O. Hatfield, *The Environmental Audit Privilege Act*, ENVTL. F., May/June 1995, at 21.

33. The Oregon statute was passed in 1993. *Effects of State's Audit Privilege Law Still Unclear After First Year, Lawyers Say*, [25 Current Reports] Env't Rep. (BNA) 1621, 1621 (Dec. 16, 1994). *See also* John L. Wittenberg & Stephanie Siegel, *Table Of State Legislation On Environmental Audit Privileges*, [18 Current Report] Chem. Reg. Rep. (BNA) 447, 447 (July 15, 1994).

34. *Despite Lack of Confidentiality Laws, Companies Conducting Audits, Lawyer Says*, [26 Current Developments] Env't Rep. (BNA) 13, 13 (May 5, 1995). *See* O'Reilly, *supra* note 15, at 141-44 (briefly discussing the Oregon, Indiana, Kentucky and Colorado statutes).

35. *Despite Lack of Confidentiality Laws, Companies Conducting Audits, Lawyers Says, supra* note 34, at 13.

36. ARK. CODE ANN. § 8-1-301 (Michie Supp. 1995); COLO. REV. STAT. ANN. § 13-25-126.5(1) (West Supp. 1995); IDAHO CODE § 9-802(1)(a) (Supp. 1995); ILL. ANN. STAT. ch. 415, para. 5/52.2(a) (Smith-Hurd Supp. 1995); KY. REV. STAT. ANN. § 224.01-040(2) (Michie Butterworth 1995); OR. REV. STAT. § 468.963(1) (Supp. 1994); UTAH CODE ANN. § 19-7-102(2)

example, Oregon's statute is intended "to encourage owners and operators of facilities . . . to conduct voluntary internal environmental audits of their compliance programs and management systems and to assess and improve compliance with such statutes . . . ."[38] Kentucky's statute recognizes that "[i]n order to encourage owners and operators of facilities . . . to conduct voluntary internal environmental audits of their compliance programs . . . and to assess and improve compliance with statutory and regulatory requirements, an environmental audit privilege is created to protect the confidentiality of communication relating to . . . audits."[39]

Colorado's statute is also concerned with voluntary compliance but balances that with a desire to not hinder regulatory action. The statute states "that the voluntary provisions of [the] act will not inhibit the exercise of the regulatory authority by those entrusted with protecting [the] environment."[40]

Each of these statutes recognizes that voluntary compliance is essential to protection of the environment. However, the actual protection of the audits is limited. Under these statutes, audit reports that fall within the privilege cannot be admitted as evidence in administrative, civil, or criminal proceedings unless an exception is satisfied.[41] Although this new privilege is potentially broad, it is limited by both the types of audits that can be performed and the types of information and situations that will be protected from disclosure.

Audits that fall under these statutes are the result of an internal, voluntary, and generally comprehensive evaluation of facilities or activities regulated under specific portions of local, state, or federal laws, and are done to identify violations,

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(1995).

37. ARK. CODE ANN. § 8-1-301 (Michie Supp. 1995); COLO. REV. STAT. ANN. § 13-25-126.5(1) (West Supp. 1995); IDAHO CODE § 9-802(1)(c) (Supp. 1995); UTAH CODE ANN. § 19-7-102(1) (1995).

38. OR. REV. STAT. § 468.963(1) (Supp. 1994).

39. KY. REV. STAT. ANN. § 224.01-040(2) (Michie Butterworth 1995).

40. COLO. REV. STAT. ANN. § 13-25-126.5(1) (West Supp. 1995).

41. ARK. CODE ANN. § 8-1-303(b) (Michie Supp. 1995) (However, this statute does not limit the public's rights under the Arkansas Freedom of Information Act (ARK. CODE ANN. §§ 25-19-101 to -107 (Michie 1992 & Supp. 1995)). ARK. CODE ANN. § 8-1-312(b).); COLO. REV. STAT. ANN. § 13-25-126.5(3) (West Supp. 1995); IDAHO CODE § 9-804 (Supp. 1995) (disclosure of environmental audit reports for nongovernmental entities cannot be compelled by the government); ILL. ANN. STAT. ch. 415, para. 5/52.2(b) (Smith-Hurd Supp. 1995); IND. CODE ANN. § 13-10-3-3 (West Supp. 1995); KAN. STAT. ANN. § 60-3333(a) (Supp. 1995) (the report is discoverable but not admissible); KY. REV. STAT. ANN. § 224.01-040(3) (Michie Butterworth 1995); MISS. CODE ANN. § 49-2-71(1) (Supp. 1995); OR. REV. STAT. § 468.963(2) (Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 5(b) (West Supp. 1996) (The government is also prohibited from requesting, using, or reviewing an audit report during an inspection. *Id.* § 5(e).); UTAH CODE ANN. § 19-7-105 (1995) (Utah's privilege only applies to administrative actions.); VA. CODE ANN. § 10.1-1198(B) (Michie Supp. 1995) (The document cannot be admitted without the owner or operator's written consent.); WYO. STAT. § 35-11-1105(c) (Supp. 1995).

prevent future violations, and improve overall compliance with those laws.[42] However, the privilege is limited in scope. All of the states, with the exception of Texas, limit the application of their statutes to reports associated with environmental audits.[43] In addition to the environmental area, Texas allows the report to address compliance with occupational safety and health regulations.[44] Although these statutes use approximately the same language, the actual activities that the privilege covers may be different depending upon the state. The assessment of a facility's compliance with traditional environmental laws, such as hazardous waste, air pollution, or water pollution, should fall within the scope of each of the respective statutes. However, it may or may not include other environmental areas, such as community right to know requirements.[45] As previously stated, only Texas allows an audit of an entity's compliance with safety and health regulations to fall within the scope of the privilege.[46] The Texas statute also requires that "the term 'environmental or health and safety law'" be broadly interpreted "[t]o fully implement the privilege."[47] Further, a few of the statutes

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42. ARK. CODE ANN. § 8-1-302(3)(A) (Michie Supp. 1995); COLO. REV. STAT. ANN. § 13-25-126.5(2)(e) (West Supp. 1995) (Colorado's language in this regard is more general than most of the other statutes.); IDAHO CODE § 9-803(3) (Supp. 1995) (Idaho's language is also very general.); ILL. ANN. STAT. ch. 415, para. 5/52.2(i) (Smith-Hurd Supp. 1995); IND. CODE ANN. § 13-10-3-1 (West Supp. 1995); KAN. STAT. ANN. § 60-3332(a) (Supp. 1995) (Kansas's statute does not use the word "comprehensive."); KY. REV. STAT. ANN. § 224.01-040(1)(a) (Michie Butterworth 1995); MISS. CODE ANN. § 49-2-2(f) (Supp. 1995) (Mississippi's statute does not use the word "comprehensive."); OR. REV. STAT. § 468.963(6)(a) (Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 3(a)(3) (West Supp. 1996) (Texas' statute also does not use the word "comprehensive" but instead calls for a "systematic . . . evaluation."); UTAH CODE ANN. § 19-7-103(4) (1995) (Utah's statute is very general and the language is nearly identical to that used in Colorado's statute.); VA. CODE ANN. § 10.1-1198(A) (Michie Supp. 1995) (Virginia's statute is also very general and does not use the word "comprehensive."); WYO. STAT. § 35-11-1105(a)(i) (Supp. 1995).

43. ARK. CODE ANN. § 8-1-302(4) (Michie Supp. 1995); COLO. REV. STAT. ANN. § 13-25-126.5(2)(b) (West Supp. 1995); IDAHO CODE § 9-803(4) (Supp. 1995); ILL. ANN. STAT. ch. 415, para. 5/52.2(i) (Smith-Hurd Supp. 1995); IND. CODE ANN. § 13-10-3-2 (West Supp. 1995); KAN. STAT. ANN. § 60-3332(b) (Supp. 1995); KY. REV. STAT. ANN. § 224.01-040(1)(b) (Michie Butterworth 1995); MISS. CODE ANN. § 49-2-(2)(e) (Supp. 1995); OR. REV. STAT. § 468.963(6)(b) (Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 4 (West Supp. 1996); UTAH CODE ANN. § 19-7-103(2) (1995); VA. CODE ANN. § 10.1-1198(A) (Michie Supp. 1995); WYO. STAT. § 35-11-1105(a)(ii) (1995).

44. TEX. REV. CIV. STAT. ANN. art. 4447cc, § 4 (West Supp. 1996).

45. OR. REV. STAT. §§ 453.307-.414 (1992 & Supp. 1994). This section concerns the state emergency planning and community right to know requirements and is not one of the sections covered by the environmental audit privilege according to OR. REV. STAT. ANN. §§ 468.963(1), .963(6)(a). Conversely, Indiana's statute would include the Community Right-To-Know requirements which are found at IND. CODE ANN. § 13-7-37-1 to -21 (West Supp. 1995). *See* IND. CODE ANN. § 13-10-3-1 (West Supp. 1995).

46. *See supra* note 44 and accompanying text.

47. TEX. REV. CIV. STAT. ANN. art. 4447cc, § 3(e) (West Supp. 1996).

require that the audit, once begun, be completed within a reasonable amount of time.[48]

Because work place safety rules and other nonenvironmental regulations are not usually included under the privilege, at least those parts of the report would be discoverable. Some statutes allow for only part of the document to lose the privilege.[49] For other statutes, it is unclear if the loss of the privilege for part of the report would, in turn, jeopardize the privilege for the remainder of the document.

B. Information that is Excluded from the Privilege

Not all information discovered during an audit would automatically be covered by the privilege. Each statute excludes certain types of information. Generally, any information that a facility must report, maintain, or have available for the government under a regulation, law, or permit; information that a regulatory agency obtains through its own efforts; or information obtained from someone who was not a part of the audit, is excluded from the privilege.[50] Beyond these three categories, Colorado's statute also excludes documents that were prepared either before the audit was begun or after it was completed and which were not part of the audit.[51] In addition, information which does not otherwise fall within any other privilege and "is developed or maintained in the course of regularly conducted business activity or regular practice" is excluded.[52] Further, even if the privilege protects the contents of the audit report, the existence of the report is discoverable.[53] Similarly, Wyoming also exempts documents that were

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48. COLO. REV. STAT. ANN. § 13-25-126.5(2)(e) (West Supp. 1995); KAN. STAT. ANN. § 60-3332(a) (Supp. 1995); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 4(e) (West Supp. 1996); WYO. STAT. § 35-11-1105(a)(i) (Supp. 1995).

49. ARK. CODE ANN. § 8-1-311 (Michie Supp. 1995); ILL. ANN. STAT. ch. 415, para. 5/52.2(g) (Smith-Hurd Supp. 1995); IND. CODE ANN. § 13-10-3-8 (West Supp. 1995); KAN. STAT. ANN. § 60-3335(f) (Supp. 1995); KY. REV. STAT. ANN. § 224.01-040(5)(e) (Michie Butterworth 1995); OR. REV. STAT. § 468.963(4)(e) (Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 9(j) (West Supp. 1996); UTAH CODE ANN. § 19-7-106(2) (1995); UTAH R. EVID. 508(e)(3)(A) (1996); WYO. STAT. § 35-11-1105(c)(ix) (Supp. 1995).

50. ARK. CODE ANN. § 8-1-305 (Michie Supp. 1995); COLO. REV. STAT. ANN. §§ 13-25-126.5(4)(a)-(d) (West Supp. 1995); IDAHO CODE §§ 9-805, -807 (Supp. 1995); ILL. ANN. STAT. ch. 415, para. 5/52.2(h) (Smith-Hurd Supp. 1995); IND. CODE ANN. §§ 13-10-3-11(a) (West Supp. 1995); KAN. STAT. ANN. § 60-3336 (Supp. 1995); KY. REV. STAT. ANN. § 224.01-040(6) (Michie Butterworth 1995); MISS. CODE ANN. §§ 49-2-71(2)(a-d) (Supp. 1995); OR. REV. STAT. § 468.963(5) (Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 8(a) (West Supp. 1996) (Further, Texas' statute specifically states that a person can agree to perform an audit and disclose the report. *Id.* § 8(b).); UTAH R. EVID. 508(d)(6)-(8) (1996); WYO. STAT. § 35-11-1105(d)(i)-(iii) (Supp. 1995).

51. COLO. REV. STAT. ANN. § 13-25-126.5(4)(e)-(f) (West Supp. 1995).

52. *Id.* § 13-25-126.5(4)(g).

53. *Id.* § 13-25-126.5(8).

created before the audit was begun or after it was completed and were independent of the audit.[54]

In addition to the three general categories of excluded information previously identified, Mississippi also excludes "[d]ocuments existing prior to the commencement of and independent of the voluntary self-evaluation with the exception of evidence establishing a request for compliance assistance to the appropriate government agency or authority."[55] The Virginia statute excludes either a portion of, or the entire document if it contains "information that demonstrates a clear, imminent and substantial danger to the public health or the environment . . . ."[56] It also excludes documents that are required by a law or were created independently of the audit.[57] Finally, Virginia's privilege is not applicable if either part of the report or the entire document was "collected, generated or developed in bad faith . . . ."[58]

A number of regulations contain notification requirements regarding the facility's situation or status.[59] For instance, if the audit uncovers evidence of a chemical spill in excess of the reportable quantity or locates unreported underground storage tanks, the facility must report such findings, and the privilege created by these statutes would not apply to that information.

Of the types of information excluded from the privilege created by these statutes, potentially the most problematic involves information that must be developed for, or reported to, the government due to a regulation or permit requirement. This category is also the easiest to expand through the issuance of new or revised permits and regulations. In spite of this, only Indiana, Texas, Illinois and Kentucky directly address this point. Indiana's statute states that the "section does not allow the regulatory agency to adopt a rule or a permit condition for the purpose of circumventing the privilege . . . by requiring disclosure of a report of a voluntarily conducted audit."[60] Texas provides that "[a] regulatory agency may not adopt a rule or impose a condition that circumvents the purpose of this [statute]."[61] Conversely, Kentucky's statute states that it does not "limit,

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54. WYO. STAT. § 35-11-1105(d)(iv)-(v) (Supp. 1995).

55. MISS. CODE ANN. § 49-2-71(2)(e) (Supp. 1995).

56. VA. CODE ANN. § 10.1-1198(B) (Michie Supp. 1995).

57. *Id.*

58. *Id.*

59. Generators of hazardous waste are required to obtain an EPA identification number before they either ship their hazardous waste to another facility or manage it at their own facility. To obtain this number, they must request it from the EPA. 40 C.F.R. § 262.12 (1995). A facility is also required to notify the National Response Center if they have released a hazardous substance in an amount over the reportable quantity within a 24 hour period. This notification is required "as soon as he has knowledge of [the] release." 40 C.F.R. § 302.6(a) (1995). If a facility has an underground storage tank that contains either petroleum or hazardous chemicals, they must inform the government. 40 C.F.R. § 280.22 (1995); 42 U.S.C. § 6991a (1994). *See also* TRUITT ET AL., *supra* note 1, at 164-98 (discussing various disclosure obligations).

60. IND. CODE ANN. § 13-10-3-11(b) (West Supp. 1995).

61. TEX. REV. CIV. STAT. ANN. art. 4447cc, § 11 (West Supp. 1996).

waive, or abrogate any reporting requirement . . . or permit condition[]."[62] Illinois' statute is even broader because "[n]othing in [it] limits, waives, or abrogates existing or future obligations of regulated entities to monitor, record, or report information required under State, federal, regional, or local laws, ordinances, regulations, permits, or orders."[63]

Most of the statutes allow the audit to be performed by the facility's owner, operator, employees, or a private contractor.[64] If any other party performs the audit, it is unlikely that the results would be privileged. For example, the results of an audit performed by an outside party, such as a vendor, customer or perhaps an insurance carrier, would probably not be protected unless they were acting as a private contractor hired specifically to conduct the audit.

The statutes also require that the audit be voluntary.[65] Therefore, audits required through some type of governmental action, such as part of a settlement negotiation[66] or a statute,[67] are not voluntary and are not protected.

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62. KY. REV. STAT. ANN. § 224.01-040(8) (Michie Butterworth 1995).

63. ILL. ANN. STAT. ch. 415, para. 5/52.2(h) (Smith-Hurd Supp. 1995).

64. ARK. CODE ANN. § 8-1-302(3)(B) (Michie Supp. 1995); COLO. REV. STAT. ANN. § 13-25-126.5(2)(e) (West Supp. 1995) (Colorado's statute specifies that the employees or consultant must be assigned the responsibility to perform the audit.); IDAHO CODE § 9-803(3) (Supp. 1995); ILL. ANN. STAT. ch. 415, para. 5/52(i) (Smith-Hurd Supp. 1995); IND. CODE ANN. § 13-10-3-1 (West Supp. 1995); KAN. STAT. ANN. § 60-3332(a) (Supp. 1995) (instead of a private contractor, Kansas requires the use of a "qualified auditor"); KY. REV. STAT. ANN. § 224.01-040(1)(a) (Michie Butterworth 1995); MISS. CODE ANN. § 49-2-2(f) (Supp. 1995) (Mississippi requires that one of these individuals perform the audit.); OR. REV. STAT. § 468.963(6)(a) (Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 3(3) (West Supp. 1996) (Texas also limits the performance of the audit to these groups.); UTAH CODE ANN. § 19-7-103(4) (1995); VA. CODE ANN. § 10.1-1198(A) (Michie Supp. 1995) (This statute does not specifically allow employees to perform the audit.); WYO. STAT. § 35-11-1105(a)(i) (Supp. 1995).

65. ARK. CODE ANN. § 8-1-302(3) (Michie Supp. 1995); COLO. REV. STAT. ANN. § 13-25-126.5(2)(e) (West Supp. 1995); IDAHO CODE § 9-803(3) (Supp. 1995) (The requirement for voluntariness is not specified but can be inferred from this section and from section 9-802(2).); ILL. ANN. STAT. ch. 415, para. 5/52(i) (Smith-Hurd Supp. 1995); IND. CODE ANN. § 13-10-3-1 (West Supp. 1995); KAN. STAT. ANN. § 60-3332(a) (Supp. 1995); KY. REV. STAT. ANN. § 224.01-040(1)(a) (Michie Butterworth 1995); MISS. CODE ANN. § 49-2-2(f) (Supp. 1995); OR. REV. STAT. § 468.963(6)(a) (Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 3(a)(3) (West Supp. 1996); UTAH CODE ANN. § 19-7-103(4) (1995); VA. CODE ANN. § 10.1-1198(A) (Michie Supp. 1995); WYO. STAT. § 35-11-1105(a)(i) (Supp. 1995).

66. Environmental Auditing Policy Statement, *supra* note 7, at 25,007 (the EPA may propose that audit requirements be included in certain types of settlement negotiations).

67. A number of statutes, including the Clean Air Act, 42 U.S.C. §§ 7401-7671q (1994), and the Emergency Planning and Community Right-To-Know Act, 42 U.S.C. §§ 11001-11050 (1994), have the potential to either directly or indirectly require environmental auditing. *See generally* Michael Herz, *Environmental Auditing and Environmental Management: The Implicit and Explicit Federal Regulatory Mandate*, 12 CARDOZO L. REV. 1241, 1241-63 (1991) (discussing various regulatory areas that can result in the imposition of audits); James R. Moore & David

C. Format of the Audit

Once an audit has been performed, the results must be reduced to writing. Some statutes require that the audit documents be labeled with a specific title,[68] while others do not require the use of any particular identification.[69] The Texas statute suggests that the documents be labeled with the words "COMPLIANCE REPORT: PRIVILEGED DOCUMENT" or similar language, but the "[f]ailure to label a document [as such] does not constitute a waiver of the audit privilege or create a presumption that the privilege does or does not apply."[70] The document itself can, and often should, include a wide range of items, such as field notes, photographs, drawings, opinions and other items generated from the audit.[71]

After the audit is done and information is generated, the final audit document can include various components. Some statutes require that an audit report include specific elements,[72] while others merely suggest what elements to

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Dabroski, *EPA Environmental Auditing Policy and Federal Criminal Enforcement*, C617 A.L.I.-A.B.A. 207, 219 (1991) (stating that certain statutes can allow EPA to require facilities to perform actions which are similar to an environmental audit).

68. ARK. CODE ANN. § 8-1-302(4) (Michie Supp. 1995) (audit documents must be labeled as "'ENVIRONMENTAL AUDIT REPORT: PRIVILEGED DOCUMENT'"); IDAHO CODE § 9-803(4) (1995) (documents must be labeled as "Environmental Audit Report" or with other language that is substantially equivalent); ILL. ANN. STAT. ch. 415, para. 5/52.2(i) (Smith-Hurd Supp. 1995) (audit documents must be labeled as "Environmental Audit Report: Privileged Document"); IND. CODE ANN. § 13-10-3-2 (West Supp. 1995) (audit documents must be labeled as "Environmental Audit Report; Privileged Document"); KAN. STAT. ANN. § 60-3332(b) (Supp. 1995) (audit documents must be labeled as "Audit Report: Privileged Document"); KY. REV. STAT. ANN. § 224.01-040(1)(b) (Michie Butterworth 1995) (audit documents must be labeled as "environment audit report: privileged document"); OR. REV. STAT. § 468.963(6)(b) (Supp. 1994) (audit documents must be labeled as "'Environmental Audit Report: Privileged Document'"); WYO. STAT. § 35-11-1105(a)(ii) (Supp. 1995) (audit documents must be labeled as "Environmental Audit Report: Privileged Document").

69. Such states include Colorado, Mississippi, Utah, and Virginia.

70. TEX. REV. CIV. STAT. ANN. art. 4447cc, § 4(d) (West Supp. 1996).

71. *See* ARK. CODE ANN. § 8-1-302(4)(A) (Michie Supp. 1995); COLO. REV. STAT. ANN. § 13-25-126.5(2)(b) (West Supp. 1995); IDAHO CODE § 9-803(4) (Supp. 1995); ILL. ANN. STAT. ch. 415, para. 5/52.2(i) (Smith-Hurd Supp. 1995) (these elements shall be included in the report, if applicable); IND. CODE ANN. § 13-10-3-2(1) (West Supp. 1995) (these items shall be included in the report); KAN. STAT. ANN. § 60-3332(b) (Supp. 1995); KY. REV. STAT. ANN. § 224.01-040(1)(b) (Michie Butterworth 1995); MISS. CODE ANN. § 49-2-2(e) (Supp. 1995); OR. REV. STAT. § 468.963(6)(b) (Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 4(c) (West Supp. 1996); UTAH CODE ANN. § 19-7-103(2) (1995); VA. CODE ANN. § 10.1-1198(A) (Michie Supp. 1995); WYO. STAT. § 35-11-1105(a)(ii) (Supp. 1995).

72. Indiana, Kentucky and Wyoming require the report to contain three elements:

1) A report from the auditor that discusses the audit's scope, information collected during the audit, findings, suggestions, and attachments,

include.[73] Although Illinois does not require the report to contain specific components, it does require that the report include a written response to the audit findings.[74] Finally, a few of the statutes do not discuss the elements of the report at all.[75]

If a facility is performing an audit in Indiana, Kentucky or Wyoming, it must make certain that the final document contains each of the required elements. Failing to do so could result in a court determining that the resulting document does not satisfy the definition of an environmental audit report, and thus, it would not be eligible for the privilege.

If the facility performing the audit is located in a state whose statute merely suggests elements to be included, then that facility has a little more latitude. To more fully provide for the protection of the resulting document, the facility may wish to include all the suggested elements or at least mention why specific elements do not apply. Reports that contain all of the suggested elements should more fully satisfy the purpose of the statute, and therefore, have a better chance of falling within the privilege. Further, if an audit report identifies a problem but does not discuss corrective actions, a court may determine that the document does not fall within the statute.

D. How the Privilege Can Be Lost

The privilege does not automatically protect environmental audit reports that

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2) An analysis of either the total report or a portion of it including issues involving the implementation of corrective actions, and

3) A plan to correct past problem areas, "improv[e] current compliance, and prevent[] future noncompliance."

IND. CODE ANN. § 13-10-3-2(2)(A)-(C) (West Supp. 1995); KY. REV. STAT. ANN. § 224.01-040(1)(b) (Michie Butterworth 1995); WYO. STAT. § 35-11-1105(a)(ii)(A)-(C) (Supp. 1995).

73. Arkansas, Illinois (with the exception noted below), Kansas, Oregon, and Texas suggest that the report include:

1) A discussion by the auditor of the audit's scope, the information identified during the audit, findings, and suggestions,

2) An analysis of either part or all of the report. This may include a discussion of issues involving implementation of corrective actions, and

3) A plan to correct areas of noncompliance which were identified and methods to provide for maintaining compliance in the future.

However, Idaho's statute is not as detailed. ARK. CODE ANN. § 8-1-302(4)(B)-(D) (Michie Supp. 1995); IDAHO CODE § 9-803(4) (Supp. 1995) (Although Idaho's statute is not as detailed, it states that the "audit report may include memoranda and documents analyzing portions or all of the audit report."); ILL. ANN. STAT. ch. 415, para. 5/52.2(i)(1)-(4) (Smith-Hurd Supp. 1995) (Illinois adds a fourth element for "[a]nalytical data"); KAN. STAT. ANN. § 60-3332(b)(1)-(3) (Supp. 1995); OR. REV. STAT. § 468.963(6)(b)(A)-(C) (Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 4(b) (West Supp. 1996).

74. ILL. ANN. STAT. ch. 415, para. 5/52.2(i) (Smith-Hurd Supp. 1995).

75. Such states include Colorado, Mississippi, Utah, and Virginia.

meet the various statutory definitions from discovery in all situations. Although the document would otherwise be protected from discovery, the privilege could be lost in a civil or criminal proceeding by either the actions of the facility for which the audit was performed or by a determination of the court.

Each of the statutes provides that the privilege can be waived.[76] However, some statutes limit the waiver of the privilege to the facility's owner or operator,[77]

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76. ARK. CODE ANN. § 8-1-304(a)(1) (Michie Supp. 1995) (The waiver must be expressly made; it can be for the entire report or for just a portion of the report. *Id.* § 8-1-304(b).); COLO. REV. STAT. ANN. § 13-25-126.5(3)(a) (West Supp. 1995); IDAHO CODE § 9-806(1) (Supp. 1995) (Idaho requires that the privilege be expressly waived. However, the privilege is only lost for the portions of the report which were specifically covered by the waiver.); ILL. ANN. STAT. ch. 415, para. 5/52.2(d)(1) (Smith-Hurd Supp. 1995) (The privilege must be expressly waived.); IND. CODE ANN. § 13-10-3-9(a) (West Supp. 1995) (The waiver can be either express or implied. Submitting the audit report under the state's confidentiality rules is not considered to be a waiver of the privilege. *Id.* § 13-10-3-9(b).); KAN. STAT ANN. § 60-3334 (Supp. 1995) (This statute allows the audit report or information from the audit to be released to employees, the owner or operator's lawyer, or an independent contractor hired to address the problems identified in the audit; a potential purchaser under an agreement that specifically provides that the information will be kept confidential; or to the government under an agreement to keep the information confidential, without waiving the privilege. *Id.* § 60-3334(b)-(c).); KY. REV. STAT. ANN. § 224.01-040(4)(a) (Michie Butterworth 1995) (The waiver can be either implied or express. Attempting to introduce the report as evidence by the owner, operator or party who took part in the audit is considered to be a waiver. *Id.* § 224.01-040(4)(b). Attempting to introduce a portion of the audit report acts as a waiver for the entire report. *Id.*); MISS. CODE ANN. § 49-2-71(1)(a) (Supp. 1995) (waiver must be expressly made); OR. REV. STAT. § 468.963(3)(a) (Supp. 1994) (Oregon allows the privilege to be either expressly waived or waived by implication.); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 6(a) (West Supp. 1996) (The waiver must be expressly made. The audit report can be disclosed to limited classes of people and only for specific reasons without waiving the privilege. *Id.* § 6(b). If the party who received the report under a confidentiality agreement discloses it, that party is liable for damages and, if the party disclosing the document is a government official, then they have committed a misdemeanor. *Id.* § 6(c), (d).); UTAH R. EVID. 508(d)(1) (1996) (The waiver must be express.); WYO. STAT. § 35-11-1105(c)(i) (Supp. 1995) (Attempting to introduce the audit report by either the owner, operator or party who conducted an activity as evidence in a "proceeding, including reporting of violations" acts as a waiver for the applicable portions of the report.).

77. ARK. CODE ANN. § 8-1-304(a)(1) (Michie Supp. 1995) (Arkansas does not consider the releasing of the report under a confidentiality agreement between the owner or operator and a limited range of third parties or to an independent contractor which was hired to help bring the facility into compliance as a waiver. *Id.* § 8-1-304(a)(3). Attempting to introduce the report as evidence by either the owner, operator or person who performed an audit activity constitutes a waiver. *Id.* § 8-1-304(a)(2).); COLO. REV. STAT. ANN. § 13-25-126.5(3)(a) (West Supp. 1995); IDAHO CODE § 9-806(1) (Supp. 1995); ILL. ANN. STAT. ch. 415, para. 5/52.2(d)(1) (Smith-Hurd Supp. 1995); IND. CODE ANN. § 13-10-3-9(a) (West Supp. 1995); KAN. STAT. ANN. § 60-3334(a) (Supp. 1995); MISS. CODE ANN. § 49-2-71(1)(a) (Supp. 1995); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 6(a) (West Supp. 1996); UTAH R. EVID. 508(d)(1) (1996); WYO. STAT. § 35-11-1105(c)(i) (1995) (Attempting to introduce the report as evidence by either the owner, operator or

while others also allow parties involved in audit activities to waive the privilege.[78] Virginia's statute is silent regarding waiver.[79]

The privilege created by most of these statutes can also be revoked if a court, following an in camera review in either an administrative, civil, or criminal action, determines that the privilege was claimed fraudulently,[80] that the material contained in the audit does not fall within the scope of the privilege,[81] or that the audit contains evidence of a violation and efforts to correct the violation were not begun promptly or were not diligently pursued.[82] Additionally, a few of the

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person who conducted an activity constitutes a waiver.).

78. KY. REV. STAT. ANN. § 224.01-040(4)(a) (Michie Butterworth 1995); OR. REV. STAT. § 468.963(3)(a) (Supp. 1994).

79. *See* VA. CODE ANN. §§ 10.1-1198 to -1199 (Michie Supp. 1995).

80. ARK. CODE ANN. §§ 8-1-307(a)(1), -308(a)(1) (Michie Supp. 1995); COLO. REV. STAT. ANN. § 13-25-126.5(3)(d) (West Supp. 1995); IDAHO CODE § 9-806(2)(a) (Supp. 1995); ILL. ANN. STAT. ch. 415, para. 5/52.2(d)(2)(A) (Smith-Hurd Supp. 1995); IND. CODE ANN. §§ 13-10-3-4(a)(2)(A), -5(a)(2)(A) (West Supp. 1995); KAN. STAT. ANN. § 60-3334(d)(1) (Supp. 1995); KY. REV. STAT. ANN. §§ 224.01-040(4)(c)(1), -040(4)(d)(1) (Michie Butterworth 1995); MISS. CODE ANN. § 49-2-71(1)(c) (Supp. 1995); OR. REV. STAT. § 468.963(3)(b)(A), (c)(A) (Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 7(a)(1) (West Supp. 1996); UTAH R. EVID. 508(d)(2) (1996); WYO. STAT. § 35-11-1105(c)(ii)(A), (c)(iii) (Supp. 1995).

81. ARK. CODE ANN. § 8-1-307(a)(2), -308(a)(2) (Michie Supp. 1995); IDAHO CODE § 9-806(2)(b) (Supp. 1995); ILL. ANN. STAT. ch. 415, para. 5/52.2(d)(2)(B) (Smith-Hurd Supp. 1995); IND. CODE ANN. §§ 13-10-3-4(a)(2)(B), -5(a)(2)(B) (West Supp. 1995); KAN. STAT. ANN. § 60-3334(d)(3) (Supp. 1995); KY. REV. STAT. ANN. §§ 224.01-040(4)(c)(2), -040(4)(d)(2) (Michie Butterworth 1995); OR. REV. STAT. § 468.963(3)(b)(B), (c)(B) (Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 7(a)(2) (West Supp. 1996) (Referring to information the company is required by rule to retain, information the government obtains on its own, or information provided by a party not involved in the audit. *Id.* § 8(a).); WYO. STAT. § 35-11-1105(c)(ii)(B), (c)(iii) (Supp. 1995).

82. ARK. CODE ANN. §§ 8-1-307(a)(3), (4), -308(a)(3), (4) (Michie Supp. 1995) (If the violation involved failure to obtain a permit, the corrective action is considered diligent if the permit application is filed within 90 days or, if a longer period is needed, after notifying the agency within 90 days and with their approval, filing the permit on the extended schedule. *Id.* §§ 8-1-307(b), -308(b).); COLO. REV. STAT. ANN. § 13-25-126.5(3)(b)(I) (West Supp. 1995) (If the facility is not in compliance with multiple environmental laws, the compliance demonstration can be satisfied by implementing a comprehensive program with a schedule to achieve compliance. *Id.* § 13-25-126.5(3)(b)(II).); ILL. ANN. STAT. ch. 415, para. 5/52.2(d)(2)(C) (Smith-Hurd Supp. 1995); IND. CODE ANN. §§ 13-10-3-4(a)(2)(C), -5(a)(2)(C) (West Supp. 1995) (If the violation was failure to obtain a permit, the correction is considered diligently made if the permit application is filed within 90 days of identifying the violation. *Id.* § 13-10-3-4(b), -5(b).); KAN. STAT. ANN. § 60-3334(d)(4) (Supp. 1995); KY. REV. STAT. ANN. §§ 224.01-040(4)(c)(3), -040(4)(d)(3) (Michie Butterworth 1995); MISS. CODE ANN. § 49-2-71(1)(b) (Supp. 1995) (If the facility is in violation of multiple environmental laws, the initiation of a comprehensive plan to correct the violation according to a specific schedule can be used to show that efforts are appropriate. *Id.* § 49-2-71(1)(b)(iii).); OR. REV. STAT. § 468.963(3)(b)(C), (c)(C) (Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 7(a)(3) (West Supp. 1996); UTAH R. EVID. 508(d)(5) (1996) (If the audit indicates

statutes allow the privilege to be lost in a criminal action if the information contained in the audit report "is not otherwise available," and the prosecution needs it and cannot obtain the equivalent of the evidence without undue delay or cost.[83] This provision only applies in a criminal proceeding but is similar to the mechanism used to obtain information protected by the work product doctrine.[84] Therefore, a court may analyze this provision similarly when deciding if information protected by the privilege should be discoverable. In a criminal proceeding, Kentucky requires that the prosecution only need the information in order for it to be revealed.[85] The Kentucky statute also provides that the audit report is not privileged in a criminal proceeding if that privilege was previously lost in a civil action.[86]

While most of the states incorporate some of the preceding concepts in their statutes, many have unique provisions that also must be reviewed prior to the initiation of an audit. For example, Colorado's regulation allows a court or administrative law judge to admit an audit report if it is "determine[d] that compelling circumstances exist that make it necessary to admit [it] into evidence or that make it necessary to subject [it] to discovery procedures."[87] Further, if the information in the report indicates that "a clear, present, and impending danger to the public health or the environment in areas outside of the facility property" exists, the report is admissible.[88] Finally, the privilege can be lost if the audit report was prepared to prevent information from being disclosed in a government action that was imminent, already underway, or one of which the facility had been notified in writing.[89]

Indiana's statute limits the audit reports in which the privilege can be revoked in a criminal, civil, or administrative proceeding to those "report[s] [that were] first issued after July 1, 1994."[90] Therefore, if the report was prepared before July 1, 1994, the effective date of the statute, and otherwise satisfies the requirements of the statute, it may not be discoverable.[91] It is unlikely, however, that an audit report prepared before the effective date of the statute would satisfy all of the requirements. Even if the audit report was issued after July 1, 1994, it would only

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that the facility is in violation of "more than one environmental law, or if the noncompliance will require substantial resources," a facility can demonstrate that its efforts are appropriate "by instituting a comprehensive program that establishes a phased schedule of actions to be taken to bring the [facility] into compliance within a reasonable amount of time."); WYO. STAT. §§ 35-11-1105(c)(ii)(C), -1105(c)(iii) (Supp. 1995).

83. IND. CODE ANN. § 13-10-3-5(a)(2)(D) (West Supp. 1995); OR. REV. STAT. § 468.963(3)(c)(D) (Supp. 1994); WYO. STAT. § 35-11-1105(c)(iii) (Supp. 1995).

84. *See infra* notes 257-73 and accompanying text.

85. KY. REV. STAT. ANN. § 224.01-040(d)(4) (Michie Butterworth 1995).

86. *Id.* § 224.01-040(9).

87. COLO. REV. STAT. ANN. § 13-25-126.5(3)(c) (West Supp. 1995).

88. *Id.* § 13-25-126.5(3)(e).

89. *Id.* § 13-25-126.5(3)(d).

90. IND. CODE ANN. §§ 13-10-3-4(a)(1), -5(a)(1) (West Supp. 1995).

91. O'Reilly, *supra* note 15, at 143.

be discoverable if the court determines that the privilege was claimed fraudulently, "[t]he material [was] not subject to the privilege," the violation was not promptly corrected, or that "the prosecut[ion had] a compelling need for the information[, it was] not otherwise available," and the equivalent could not be obtained without unreasonable delay and cost.[92]

In addition to reasons previously discussed, the Kansas statute allows an audit report to be discovered if "the party asserting the privilege has not implemented a management system to assure compliance with environmental laws."[93] Mississippi's statute allows the privilege to be lost if the court decides that the

> report was prepared to avoid disclosure of information in . . . [a] proceeding that was underway, or for which the person had been provided written notification that an investigation into a specific violation had been initiated; or . . . [t]he court . . . determines that . . . a condition exists that demonstrates an imminent and substantial hazard or endangerment to the public health and safety or the environment.[94]

Further, if the audit report is not "kept and maintained solely within the confines of the evaluated party," the privilege will be lost.[95]

Similarly, Utah allows the privilege to be lost if the "audit report was prepared to avoid disclosure of information in . . . [an] investigation or proceeding that was

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92. IND. CODE ANN. §§ 13-10-3-4(a)(2), -5(a)(2)(A)-(D) (West Supp. 1995).

93. KAN. STAT. ANN. § 60-3334(d)(2) (Supp. 1995). The statute goes on to identify important characteristics that the management system should have based on the traits of the entity. They include:

> (A) A system that covers all parts of the entity's operations regulated under one or more environmental laws;
> (B) a system that regularly takes steps to prevent and remedy noncompliance;
> (C) a system that has the support of senior management;
> (D) the entity implements a system that has policies, entity standards and procedures that highlight the importance of assuring compliance with all environmental laws;
> (E) the entity's policies, standards and procedures are communicated effectively to all in the entity whose activities could affect compliance achievement;
> (F) specific individuals within both high-level and plant- or operation-level management are assigned responsibility to oversee compliance with such standards and procedures;
> (G) the entity undertakes regular review of the status of compliance, including routine evaluation and periodic auditing of day-to-day monitoring efforts, to evaluate, detect, prevent and remedy noncompliance;
> (H) the entity has a reporting system which employees can use to report unlawful conduct within the organization without fear of retribution; and
> (I) the entity's standards and procedures to ensure compliance are enforced through appropriate employee performance, evaluation and disciplinary mechanisms[.]

Id.

94. MISS. CODE ANN. § 49-2-71(1)(c)-(d) (Supp. 1995).

95. *Id.* at § 49-2-2(e).

already underway and known to the person [invoking] the privilege."[96] Utah also allows the privilege to be lost "[i]f the information contained in the . . . report must be disclosed to avoid a clear and impending danger to public health or the environment outside of the facility property."[97] Wyoming revokes the privilege if the report has information that "demonstrates a substantial threat to the public health or environment or damage to real property or tangible personal property" outside the plant.[98]

Virginia's statute allows the court to obtain an audit report if reason exists to believe that either the entire report or part of it falls within an exception to the privilege and that knowledge is based on information independent of the audit.[99] The court can then review the relevant portions of the document to decide whether the information is privileged.[100] However, a party that receives access to the information cannot disclose that information unless allowed by the court or hearing examiner.[101]

Most of the statutes address the procedural issues for obtaining the audit report. The burden of proving the applicability of the privilege is generally assigned to the party claiming it and the burden of proving that the document falls within an exception is assigned to the party seeking disclosure of the audit report.[102] Further, the entity who performed the audit bears the burden of proving

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96. UTAH R. EVID. 508(d)(3) (1996).

97. *Id.* 508(d)(4).

98. WYO. STAT. § 35-11-1105(c)(ii)(D) (Supp. 1995).

99. VA. CODE ANN. § 10.1-1198(C) (Michie Supp. 1995).

100. *Id.*

101. *Id.*

102. ARK. CODE ANN. § 8-1-310 (Michie Supp. 1995) (The party requesting the document must prove fraud or, if the prosecutor is attempting to obtain the document, they must prove that the appropriate exceptions are satisfied.); COLO. REV. STAT. ANN. § 13-25-126.5(7) (West Supp. 1995); ILL. ANN. STAT. ch. 415, para. 5/52.2(d)(3), (e)(5) (Smith-Hurd Supp. 1995); IND. CODE ANN. § 13-10-3-6 (West Supp. 1995) (The party requesting the document must prove fraud or, if they are a prosecutor, that they need the information, cannot otherwise obtain it, and the substantially equivalent information is not available without undue delay or cost.); KAN. STAT. ANN. §§ 60-3334(e), 60-3335(e) (Supp. 1995) (The party attempting to obtain the document must prove "that the privilege is asserted for a fraudulent purpose or to prevent disclosure of past noncompliance" or, in a criminal action, that the material does not fall within the privilege.); KY. REV. STAT. ANN. § 224.01-040(4)(e) (Michie Butterworth 1995) (The party requesting the document must prove fraud and, if it is the prosecutor, that the document contains evidence of an offense and the prosecutor needs the information.); MISS. CODE ANN. § 49-2-71(5) (Supp. 1995); OR. REV. STAT. § 468.963(3)(d) (Supp. 1994) (The party seeking disclosure must show fraud or, if they are a prosecutor, that they need the information, cannot otherwise obtain it, and cannot get equivalent information without unnecessary delay and cost.); TEX. REV. CIV. STAT. ANN. art. 4447cc, §§ 5(f), 7(b) (West Supp. 1996) (The party claiming the privilege has the burden of proving that the privilege is applicable, while the party attempting to have the report disclosed in an administrative, civil, or criminal proceeding, must prove that an exception applies to the audit report.); UTAH CODE ANN. § 19-7-106(3)-(4) (1995); UTAH R. EVID. 508(f) (1996); VA. CODE

that appropriate corrective actions were promptly undertaken and diligently pursued.[103] Of course, the parties can stipulate whether or not specific information in the report is included in the privilege.[104]

Idaho places the burden of proving that disclosing the document is appropriate or that the privilege was fraudulently claimed on the party seeking the information.[105] However, the fact that the entity has a "written environmental compliance policy" or has a plan in place to comply with applicable laws is prima facie evidence that the audit report was done to prevent violations and improve the entity's compliance; and thus, the report is eligible for protection.[106] Colorado allows the privilege to be lost if, based on information independent of the audit, a party can "show[] . . . that probable cause exists to believe that an exception . . . is applicable . . . or that the privilege does not apply . . . ."[107] If this occurs, then the party can get access to the document but must keep it confidential.[108] If they fail to do so, then they are liable for damages caused by the release of the information,[109] or, if the releasing party is employed by the government, they can be subject to a monetary penalty and be guilty of a misdemeanor.[110] If a third party obtains the report in violation of the statute and in turn releases it, they too can be liable for damages.[111]

Mississippi's rule, like Colorado's rule, allows the party to gain access to the report if they can show, based on knowledge independent of the audit, "that probable cause exists to believe that an exception . . . is applicable . . . or that the privilege does not apply . . . ."[112] Further, that party is forbidden from releasing the audit information unless the court allows it.[113] If they do release information,

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ANN. § 10.1-1198(C) (Michie Supp. 1995); WYO. STAT. § 35-11-1105(c)(iv) (Supp. 1995) (The party requesting the document must prove fraud and, in a criminal proceeding, the prosecutor has the burden of proving that the applicable elements exist for the privilege to be revoked.).

103. ARK. CODE ANN. § 8-1-310(a) (Michie Supp. 1995); IND. CODE ANN. § 13-10-3-6(b) (West Supp. 1995); KAN. STAT. ANN. § 60-3334(e)(1) (Supp. 1995); KY. REV. STAT. ANN. § 224.01-040(4)(e) (Michie Butterworth 1995); OR. REV. STAT. § 468.963(3)(d) (Supp. 1994); WYO. STAT. § 35-11-1105(c)(iv) (Supp. 1995).

104. ARK. CODE ANN. § 8-1-306 (Michie Supp. 1995); ILL. ANN. STAT. ch. 415, para. 5/52.2(f) (Smith-Hurd Supp. 1995); IND. CODE ANN. § 13-10-3-10 (West Supp. 1995); KAN. STAT. ANN. § 60-3335(e) (Supp. 1995); KY. REV. STAT. ANN. § 224.01-040(5)(d) (Michie Butterworth 1995); OR. REV. STAT. § 468.963(4)(d) (Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 9(i) (West Supp. 1996); WYO. STAT. § 35-11-1105(c)(viii) (Supp. 1995).

105. IDAHO CODE § 9-806(3) (Supp. 1995).

106. *Id.*

107. COLO. REV. STAT. ANN. § 13-25-126.5(5)(a) (West Supp. 1995).

108. *Id.*

109. *Id.* § 13-25-126.5(5)(b)(I).

110. *Id.* § 13-25-126.5(5)(b)(II).

111. *Id.* § 13-25-126.5(5)(b)(I).

112. MISS. CODE ANN. § 49-2-71(3)(a) (Supp. 1995).

113. *Id.*

without court approval, they are liable for damages.[114] In addition, if a party obtains the report in violation of the statute and releases the information, they too are liable for damages.[115]

Utah's statute also states that if the audit report is disclosed in violation of the Utah Rules of Evidence, the information cannot be used as evidence in a criminal, civil, or administrative proceeding.[116] Penalties for improperly disclosing the audit report can include fines, contempt of court, and conviction of a misdemeanor.[117] The party who improperly discloses the information is responsible for damages associated with the disclosure.[118]

Regarding potential criminal proceedings, some of the statutes allow the prosecution to obtain the report if, based on information independent of the audit, probable cause exists to believe that an "offense has been committed."[119] The burden is then placed on the facility's owner or operator to request a hearing to decide if the report is privileged.[120] If the owner or operator fails to request a hearing, they waive the privilege.[121] If a hearing is requested, the prosecution can have access to the audit report to prepare for the hearing but cannot use any of the information against the facility unless the court determines it is subject to disclosure.[122]

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114. *Id.* § 49-2-71(3)(b).

115. *Id.*

116. UTAH CODE ANN. § 19-7-104(1) (1995).

117. *Id.* § 19-7-104(3).

118. *Id.* § 19-7-104(2).

119. ARK. CODE ANN. § 8-1-309(a)(1)-(2) (Michie Supp. 1995); IND. CODE ANN. § 13-10-3-7(a) (West Supp. 1995); KAN. STAT. ANN. § 60-3335(a) (Supp. 1995); KY. REV. STAT. ANN. § 224.01-040(5)(a) (Michie Butterworth 1995); OR. REV. STAT. § 468.963(4)(a) (Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 9(a) (West Supp. 1996); WYO. STAT. § 35-11-1105(c)(v) (Supp. 1995).

120. ARK. CODE ANN. § 8-1-309(b)(1) (Michie Supp. 1995); IND. CODE ANN. § 13-10-3-7(b) (West Supp. 1995); KAN. STAT. ANN. § 60-3335(b) (Supp. 1995); KY. REV. STAT. ANN. § 224.01-040(5)(b) (Michie Butterworth 1995); OR. REV. STAT. § 468.963(4)(b) (Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 9(c) (West Supp. 1996); WYO. STAT. § 35-11-1105(c)(vi) (Supp. 1995).

121. ARK. CODE ANN. § 8-1-309(b)(2) (Michie Supp. 1995); IND. CODE ANN. § 13-10-3-7(b) (West Supp. 1995); KAN. STAT. ANN. § 60-3335(b) (Supp. 1995); KY. REV. STAT. ANN. § 224.01-040(5)(b) (Michie Butterworth 1995); OR. REV. STAT. § 468.963(4)(b) (Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 9(c) (West Supp. 1996); WYO. STAT. § 35-11-1105(c)(vi) (Supp. 1995).

122. ARK. CODE ANN. § 8-1-309(c)(2)-(3) (Michie Supp. 1995); IND. CODE ANN. § 13-10-3-7(c) (West Supp. 1995); KAN. STAT. ANN. § 60-3335(c)-(d) (Supp. 1995) (Any evidence obtained from the report can be suppressed in criminal, civil, and administrative proceedings if information is disclosed in violation of this section. *Id.* § 60-3335(d).); KY. REV. STAT. ANN. § 224.01-040(5)(c) (Michie Butterworth 1995); OR. REV. STAT. § 468.963(4)(c) (Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 9(d)-(g) (West Supp. 1996); WYO. STAT. § 35-11-1105(c)(vii) (Supp. 1995).

The Illinois statute requires the party claiming the privilege to identify the portions of the document that are being claimed as privileged after it has been asserted that the privilege does not apply.[123] If the government has not been denied access to the report in a proceeding[124] and has made a written request for the report, the owner or operator must then request a hearing within a specific period of time.[125] If they fail to do so, they waive the privilege.[126] The court can also revoke the privilege if the document falls within an exception previously discussed.[127]

The Texas privilege also provides that evidence from an audit report obtained in violation of the statute cannot be used in a criminal, civil, or administrative proceeding.[128] Further, the party that failed to comply with the privilege must prove that the evidence they wish to introduce did not originate from the audit report.[129] If the report has been disclosed in contempt of court, then relief can be ordered.[130]

Utah also allows the court to perform an in camera review of the audit report.[131] Unlike most of the other states, however, Utah does not allow the party requesting the audit, such as the government, access to the report until the court determines which portions, if any, will be subject to disclosure.[132] Following this review, the court can release the portions of the report that are not privileged.[133] The portions of the report that are still privileged cannot be disclosed.[134]

Besides the protection provided to the audit report itself, some of the states also prevent parties involved in the audit from being called to testify about it.[135] Colorado limits this provision to audits performed from June 1, 1994 to June 30, 1999.[136]

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123. ILL. ANN. STAT. ch. 415, para. 5/52.2(d)(4) (Smith-Hurd Supp. 1995).

124. *Id.* § 5/52.2(d)(5).

125. *Id.* § 5/52.2(e)(1).

126. *Id.*

127. *Id.* § 5/52.2(e)(4). *See supra* notes 80-82 and accompanying text.

128. TEX. REV. CIV. STAT. ANN. art. 4447cc, § 9(h) (West Supp. 1996).

129. *Id.*

130. *Id.* § 9(k).

131. UTAH R. EVID. 508(e)(1) (1996).

132. *Id.* 508(e)(2).

133. *Id.* 508(e)(3)(A).

134. *Id.* 508(e)(3)(B).

135. COLO. REV. STAT. ANN. § 13-90-107(1)(j)(I)(A) (West Supp. 1995) (The person for whom the audit was performed can allow the person to testify or the court can order the person to testify.); ILL. ANN. STAT. ch. 415, para. 5/52.2(c) (Smith-Hurd Supp. 1995); KAN. STAT. ANN. § 60-3333(b) (Supp. 1995); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 5(c) (West Supp. 1996) (The person can be compelled to testify about events regarding the violation which they witnessed but not about the audit document. *Id.* § 4(d).); UTAH CODE ANN. § 19-7-107(1) (1995) (The person for whom the audit was performed must grant permission for the person to be examined unless the court orders them to testify.); VA. CODE ANN. § 10.1-1198(B) (Michie Supp. 1995).

136. COLO. REV. STAT. ANN. § 13-90-107(1)(j)(II) (West Supp. 1995).

E. Relationship of the Statutory Audit Privilege to Other Privileges

With each of these statutes, the intent was that the newly created privilege would be in addition to any other privileges, including the attorney-client privilege and work product doctrine.[137] Therefore, if both a statutory audit privilege and a common law privilege apply to the audit, both can be used to protect it. Furthermore, if the audit report does not fall within the scope of the statute, the common law privileges can still be used to provide some protection from discovery of the report.

F. Immunity from and Reduction of Penalties

In addition to creating a privilege for audit documents, some states have created enforcement-based incentives. The first state to create an enforcement-based incentive was Colorado.[138] Colorado gives a facility immunity from civil and administrative penalties and "criminal penalties for negligent acts associated with the issues disclosed"[139] if the facility performs a "voluntary self-evaluation,"[140] promptly reveals information obtained,[141] promptly corrects the problem,[142] and cooperates with the government.[143] A presumption is created that the notification is voluntary,[144] but that presumption can be rebutted by the government.[145] However, the penalties will not be waived if the facility has a pattern of serious violations over the three-year period preceding the disclosure.[146]

It should be noted that, in Colorado, a disclosure is not voluntary, and thus not eligible for a waiver of penalties, if the disclosure is required "under a specific permit condition or . . . an order . . . ."[147] Therefore, if the company discovers a problem that requires notification of the government due to a permit condition, has a history of serious noncompliance, or merely delays informing the government about the violation, immunity from prosecution would be lost. Even if the penalty

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137. ARK. CODE ANN. § 8-1-312(a) (Michie Supp. 1995); COLO. REV. STAT. ANN. § 13-25-126.5(6) (West Supp. 1995); IDAHO CODE § 9-808 (Supp. 1995); ILL. ANN. STAT. ch. 415, para. 5/52.2(j) (Smith-Hurd Supp. 1995); IND. CODE ANN. § 13-10-3-12 (West Supp. 1995); KAN. STAT. ANN. § 60-3337 (Supp. 1995); KY. REV. STAT. ANN. § 224.01-040(7) (Michie Butterworth 1995); MISS. CODE ANN. § 49-2-71(4) (Supp. 1995); OR. REV. STAT. § 468.963(7) (Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 13 (West Supp. 1996); UTAH R. EVID. 508(g) (1996); VA. CODE ANN. § 10.1-1198(B) (Michie Supp. 1995); WYO. STAT. § 35-11-1105(e) (Supp. 1995).

138. Colorado's law was passed in 1994.

139. COLO. REV. STAT. ANN. § 25-1-114.5(4) (West Supp. 1995).

140. *Id.* § 25-1-114.5(1)(b).

141. *Id.* § 25-1-114.5(1)(a).

142. *Id.* § 25-1-114.5(1)(c).

143. *Id.* § 25-1-114.5(1)(d).

144. *Id.* § 25-1-114.5(4).

145. *Id.* § 25-1-114.5(5).

146. *Id.* § 25-1-114.5(6).

147. *Id.* § 25-1-114.5(3).

is waived, the state is not limited regarding the type of response it can require a facility to take to address the problem that was disclosed.[148]

Idaho also provides immunity for the voluntary disclosure of violations identified by an audit.[149] For the disclosure to be considered voluntary, the statute requires the disclosure be timely, identified through an audit, and immediate action be taken to come into compliance.[150] If the violation involves the failure to obtain a required permit, timely submission of the application can be used to show that appropriate actions were taken to come into compliance.[151] Like Colorado,[152] the disclosure is not considered voluntary if required by a permit or an order,[153] or if the company has a pattern of serious violations in the three years preceding the disclosure.[154] Idaho is also not limited in the types of actions it can order in response to the disclosed violation.[155] Finally, if the circumstance is such that Idaho's "governor deems an imminent and substantial danger to the public health or environment" exists, the information in the audit can be disclosed "as may be necessary to assure the protection of the public health or environment."[156] Otherwise, "[v]oluntarily prepared environmental audits, and voluntary disclosures of information submitted . . . to an environmental agency . . . which are claimed to be confidential business information" must be kept confidential.[157]

Kansas has also created a presumption of immunity from civil, criminal, and administrative penalties if the disclosure is voluntarily made.[158] Kansas requires that the disclosure be made promptly[159] to the agency with jurisdiction over the violation,[160] be identified as a result of an audit, [161] ensure corrective actions are diligently initiated,[162] and that the entity cooperates with the regulatory agency during its subsequent investigation.[163] The immunity can be forfeited if the disclosure was required under state law,[164] the company willfully or intentionally committed the violation,[165] the violation was not corrected diligently,[166] or if the

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148. *Id.* § 25-1-114.5(7).
149. IDAHO CODE § 9-809(1) (Supp. 1995).
150. *Id.* § 9-809(2).
151. *Id.* § 9-809(3).
152. *See supra* note 147 and accompanying text.
153. IDAHO CODE § 9-809(5) (Supp. 1995).
154. *Id.* § 9-809(6).
155. *Id.* § 9-809(7).
156. *Id.* § 9-810(2).
157. *Id.* § 9-340[45](43).
158. KAN. STAT. ANN. § 60-3338(a) (Supp. 1995).
159. *Id.* § 60-3338(a)(1).
160. *Id.* § 60-3338(a)(2).
161. *Id.* § 60-3338(a)(3).
162. *Id.* § 60-3338(a)(4).
163. *Id.* § 60-3338(a)(5).
164. *Id.* § 60-3338(b), (c)(1).
165. *Id.* § 60-3338(c)(2).
166. *Id.* § 60-3338(c)(3).

violation caused "significant environmental harm or a public health threat . . . ."[167] Even if the facility is not eligible for immunity, the fact that the facility "implemented an environmental management system" as described in Kansas' statute can be considered in determining the appropriate penalty for the violation.[168]

Mississippi also considers the voluntary identification of an environmental violation through an audit and subsequent disclosure as a factor in determining the amount of assessed penalties.[169] If the company satisfies the requirements of the statute, penalties are to be set at a de minimis amount, excluding any economic benefit realized by the company due to its failure to comply with the regulations.[170] Mississippi requires, among other factors, that the disclosure be voluntary[171] and that the violation "did not result in a substantial endangerment threatening the public health, safety or welfare or the environment."[172] Mississippi also allows the environmental audit and subsequent voluntary disclosure to be considered when assessing penalties under various acts.[173] However, the Mississippi statute requires the state to establish and administer the audit privilege and the penalty reduction provisions so that the delegation of federal programs to the state is not lost.[174]

The Texas statute also grants immunity from civil, administrative, and criminal penalties if the company makes a voluntary disclosure of an environmental or health and safety violation.[175] The disclosure, to be considered voluntary, must be made promptly after identifying the problem[176] by certified mail to the agency with jurisdiction over the violation,[177] and prior to an investigation or the identification of a violation by the government.[178] In addition, the statute requires that the disclosure originates through an audit,[179] appropriate actions are promptly taken and diligently pursued to correct the violation,[180] the company cooperates with the government in investigating the violation,[181] and "the violation did not result in injury to one or more persons at the site or substantial off-site

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167. *Id.* § 60-3338(c)(4).

168. *Id.* § 60-3339.

169. MISS. CODE ANN. § 17-17-29(7)(g) (1995).

170. *Id.*

171. *Id.* § 17-17-29(7)(g)(iv).

172. *Id.* § 17-17-29(7)(g)(vi) (Other factors include: the report is promptly made after the violation is discovered, appropriate actions are taken to correct the problem, the facility cooperates with the government, and an independent party or the government was not the source of the information. *Id.* § 17-17-29(7)(g)(i)-(iii), & (v).).

173. *See id.* §§ 17-17-29(1995), 49-17-43 (Supp. 1995), 49-17-427 (Supp. 1995).

174. 1995 Miss. Laws 627, § 1.

175. TEX. REV. CIV. STAT. ANN. art. 4447cc, § 10(a) (West Supp. 1996).

176. *Id.* § 10(b)(1).

177. *Id.* § 10(b)(2).

178. *Id.* § 10(b)(3).

179. *Id.* § 10(b)(4).

180. *Id.* § 10(b)(5).

181. *Id.* § 10(b)(6).

harm to persons, property, or the environment."[182] The immunity will be lost if the disclosure is required under an order,[183] if the entity has a pattern of serious violations over a three-year period,[184] or the violation satisfies the levels of culpability, severity, or cause specified in the statute.[185] The statute allows penalties to be mitigated based on a number of factors including the voluntary nature of the disclosure and the entity's efforts to perform audits.[186]

Unlike other states, Texas makes receiving immunity contingent upon the entity notifying the regulatory agency of its intent to perform the audit.[187] The statute specifies that the notice must identify the areas and facilities to be audited, the scope of the audit, and when the audit will occur.[188]

Wyoming's statute also grants immunity, but only for administrative and civil penalties.[189] To obtain this immunity, the disclosure must be made within sixty days of completing the audit.[190] Furthermore, it can be lost if the facility was being "investigat[ed] for any violation of this act at the time the violation [was] reported;"[191] the owner does not correct the violation within the time period identified in an order;[192] or

> [t]he violation is the result of gross negligence or recklessness; or . . . [t]he department has assumed primacy over a federally delegated environmental law and a waiver of penalty authority would result in a state program less stringent than the federal program or the waiver would violate any federal rule or regulation required to maintain state primacy. If a federally delegated program requires the imposition of a penalty for a violation, the voluntary disclosure of the violation shall to the extent allowed under federal law or regulation, be considered a mitigating factor in determining the penalty amount.[193]

The immunity established by Wyoming's statute can also be lost if a rule, code, or law requires the violation to be reported,[194] or if the facility has a pattern of serious violations within the three-year period before disclosure.[195]

Virginia also grants immunity and, like Wyoming, limits it to administrative

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182. *Id.* § 10(b)(7).

183. *Id.* § 10(c).

184. *Id.* § 10(h).

185. *Id.* § 10(d).

186. *Id.* § 10(e) (other factors considered include corrective action, cooperation with the government, and other "relevant considerations").

187. *Id.* § 10(g).

188. *Id.*

189. WYO. STAT. § 35-11-1106(a) (Supp. 1995).

190. *Id.*

191. *Id.* § 35-11-1106(a)(i).

192. *Id.* § 35-11-1106(a)(ii).

193. *Id.* § 35-11-1106(a)(iii)-(iv).

194. *Id.* § 35-11-1106(b).

195. *Id.* § 35-11-1106(d).

and civil penalties "[t]o the extent consistent with requirements imposed by federal law . . . ."[196] The factors that make a disclosure voluntary are that it is not required under a permit, order, or law; it was promptly made after discovery of the violation through an audit; and the violation was corrected diligently following a compliance schedule that was submitted to the government.[197] The immunity will be lost if the entity "making the voluntary disclosure has acted in bad faith."[198] The statute specifies that the immunity "section does not bar the institution of a civil action claiming compensation for injury to person or property against an owner or operator."[199]

Indiana recently passed a statute that allows the government to limit civil penalties for small businesses that provide a written report of minor violations.[200] The statute only applies to facilities with less than 500 employees.[201] To be eligible, the violation being corrected must be disclosed before a government inspection identifies it or a notice of violation is received.[202] The penalty will not be reduced if either the environment or public health is damaged or endangered, the violation is not corrected within the specified period, the violation was criminal, willful or intentional, or the entity has previously received a notification from the government regarding this violation or a previous violation.[203]

The provisions created by most of these statutes are ongoing. However, two of the statutes require that the privilege, disclosure exemption, or immunity end on a specific date.[204]

G. Minnesota's Statute

Minnesota's statute is unique in that the protection of an environmental audit is tied to a new program designed "to promote voluntary compliance with environmental requirements."[205] Companies that satisfy the statute's requirements are allowed to display a "'green star' emblem."[206]

Minnesota's Environmental Improvement Pilot Program[207] is limited to

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196. VA. CODE ANN. § 10.1-1199 (Michie Supp. 1995).

197. *Id.*

198. *Id.*

199. *Id.*

200. IND. CODE ANN. § 13-7-13-5(b) (West Supp. 1995).

201. *Id.* § 13-7-13-5(a).

202. *Id.* § 13-7-13-5(b).

203. *Id.* § 13-7-13-5(a)(1)-(4).

204. COLO. REV. STAT. ANN. § 13-25-126.5(9) (West Supp. 1995) and COLO. REV. STAT. ANN. § 25-1-114.5(9) (West Supp. 1995) (privilege and immunity apply to audits performed through June 30, 1999); IDAHO CODE § 9-340[45](43) (Supp. 1995) and IDAHO CODE § 9-809 (Supp. 1995) (immunity and records exempt from disclosure include audits and disclosures submitted by December 31, 1997).

205. 1995 Minn. Sess. Law Serv. 168, § 8 (West).

206. *Id.* § 14.

207. *Id.*

facilities that have not had an enforcement action resulting in a penalty for at least one year.[208] If a facility is eligible to take part in the program, it must, among other things, perform a self-evaluation or environmental audit.[209] Following the assessment, the facility must submit a report[210] to the state and, in some cases, the local government, "within 45 days after the date of the final written report of . . . an environmental audit or . . . completion of a self-evaluation."[211] The report must identify all violations,[212] any corrective action,[213] and include "a commitment . . . to correct the violation[] as expeditiously as possible under the circumstances . . . ,"[214] as well as other items.[215] After the facility submits the report, its name and location and, when applicable, the schedule to correct the identified violations will be included in a quarterly report to be published by the government.[216] If a schedule to correct the violation(s) is submitted, it must be reviewed and approved by the government.[217]

If the facility submits a report as previously discussed, the state is required to postpone taking any enforcement action for either ninety days or until the expiration of a longer approved schedule, so long as the company meets performance goals identified in the approved schedule.[218] If the company timely corrects the problem and certifies that it has been corrected, then the state is barred from assessing any criminal, civil, or administrative penalties.[219] However, criminal penalties can be imposed if the violation was committed knowingly.[220] Administrative or civil penalties can be assessed if the entity was involved in an enforcement action for the same violation as that identified in the report within the previous year, the "violation caused serious harm to public health or the environment . . . ,"[221] or the state initiates an action to prevent "an imminent threat to public health or the environment."[222] There is no preclusion regarding enforcement actions if the state discovers the violation before the report is submitted.[223]

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208. *Id.* § 10(1).
209. *Id.* § 10(1)(1).
210. *Id.* § 10(1)(4).
211. *Id.* § 10(2).
212. *Id.* § 10(2)(2).
213. *Id.*
214. *Id.* § 10(2)(3).
215. *Id.* § 10(2) (other items which the report must include are a certification that the facility satisfies all the qualification requirements, a compliance schedule if corrective actions will take more than 90 days, and a discussion of methods to prevent the violation from recurring).
216. *Id.* § 11.
217. *Id.* § 12(a).
218. *Id.* § 13(1).
219. *Id.* § 13(2).
220. *Id.* § 13(3)(1).
221. *Id.* § 13(3)(2).
222. *Id.* § 13(3)(3).
223. *Id.* § 13(5).

If the facility is not eligible for a penalty waiver, the amount of the penalty can still be reduced.[224] One of the factors that must be considered when reducing the penalty is whether "the . . . entity demonstrated good faith efforts to achieve compliance since implementing an environmental auditing or self-evaluation program . . . ."[225]

The statute also prohibits the state from obtaining an audit report or items created as a result of an audit "except in accordance with the agency's policy on environmental auditing."[226] The goal of the Minnesota Pollution Control Agency's "policy is: [t]o promote environmental auditing; [t]o elevate the level of environmental compliance; [t]o appropriately reduce the concern about the risk of enforcement for those operating in good faith; and [t]o encourage progress beyond mere compliance, i.e. pollution prevention."[227] The policy provides that it will not routinely request audit documents if the audit was done in good faith, except when the agency believes the report contains evidence of a criminal violation.[228] The policy also sets minimum standards of what constitutes good faith.[229]

Further, if the agency obtains an audit report, it will attempt to "limit the information sought to . . . the suspected criminal violation[] and will attempt to

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224. *Id.* § 13(4).

225. *Id.* § 13(4)(5).

226. *Id.* § 15(1).

227. Minnesota Pollution Control Agency, Policy on Environmental Auditing 2-3 (January 24, 1995) (unpublished document) (on file with author).

228. *Id.* at 4

> The [agency] will not, as a matter of routine procedure, request, inspect or seize environmental audit reports from regulated entities which have conducted environmental audits in good faith, except in the event that the [agency] reasonably believes that there is probable cause that a violation of the criminal law has been or is being committed and that such materials are evidence of the commission of a gross misdemeanor or felony.

Id.

229. *Id.* at 4-5.

> A regulated entity shall be deemed to have acted in good faith under this policy when, at a minimum:
>
> a. It has conducted an environmental audit, and;
>
> b. It has taken corrective or preventative action, which can be demonstrated as reasonably timely under the circumstances, with respect to any identified deficiencies in environmental compliance; and
>
> c. It has cooperated fully and promptly with regulatory authorities in addressing issues of noncompliance; and
>
> d. The regulated entity, upon the discovery of a compliance shortfall through self-assessment, has not only corrected the noncompliance, but has gone further and implemented an active system or program to detect and prevent future occurrences of noncompliance of a similar nature.

Id.

obtain the needed information from other sources."[230] Further, the agency will not disclose trade secrets if the entity successfully qualifies the information for such treatment.[231] The policy also identifies factors the agency will consider when determining the level of enforcement to take against entities that perform audits.[232] An environmental auditing program will be taken into consideration by the agency when determining if a penalty should be reduced.[233]

Minnesota's privilege statute states that the audit documents and associated information will be protected from disclosure to third parties if the report complies with the requirements previously discussed.[234] In addition, the statute states that participation in this program does not limit any common law or other statutory protection for audit documents.[235] However, the statute does not relieve entities from making reports as required by permits, rules, or laws.[236]

Finally, this program terminates on July 1, 1999,[237] unless the legislature elects to extend the program following a report which the agency must file regarding its effectiveness.[238] Audit reports filed prior to the expiration date will continue to be protected after the statute expires.[239]

Both Minnesota's statute and audit policy provide some protection to environmental audits. However, unlike the previously discussed statutes, Minnesota only addresses audits at facilities that are participating in the Green Star Program. If a facility is not in that program and performs an audit, that document will not be protected by the statute. Minnesota's only non-common law protection for environmental audits comes from its audit policy. While both the policy and the statute are helpful, they only provide limited protection for environmental audit documents.

II. OTHER METHODS OF PROTECTING THE FINDINGS OF AN ENVIRONMENTAL AUDIT

As previously noted, the state statutes do not limit common law privileges in any way. Three common law privileges used to protect environmental audits are the attorney-client privilege, the work product doctrine, and the self-evaluation

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230. *Id.* at 5.

231. *Id.*

232. *Id.* at 7-8.

233. *Id.* at 8.

234. 1995 Minn. Sess. Law Serv. 168, § 15(2) (West). *See supra* notes 210-15 and accompanying text.

235. 1995 Minn. Sess. Law Serv. 168, § 15(3) (West).

236. *Id.* § 17.

237. *Id.* § 19.

238. *Id.* § 20.

239. *Id.* § 18.

privilege.[240] Unfortunately, the applicability of each of these privileges is limited.[241]

A. The Attorney-Client Privilege

Environmental audits have the potential to be protected by the attorney-client privilege. "The attorney-client privilege is the oldest of the privileges . . . known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and therefore promote broader public interests in the observance of law and administration of justice."[242] In *United States v. United Shoe Machinery Corp.*,[243] the requirements of the attorney-client privilege were identified as: (1) the person holding the privilege is or wants to be a client; (2) the communication is to an attorney or the attorney's employee who is acting in that role; (3) the client confidentially relates a fact to the attorney to obtain either legal advice or services but not to commit a crime; and (4) the client claims the privilege and has not waived it.[244]

The use of the attorney-client privilege regarding environmental audits poses some difficulty because all of these elements must be satisfied. The primary purpose of the communication must be for legal advice.[245] Therefore, if an attorney is part of the environmental auditing team but is not acting as an attorney, then the communication is not privileged. This would occur if the lawyer's role involved providing engineering, technical, or managerial assistance instead of legal advice.[246]

If the audit is performed by a consultant, that information may be included within the attorney-client privilege so long as the consultant is acting as "an agent of the attorney."[247] Allowing this information to be protected promotes the policy underlying the privilege because it assists the attorney in obtaining all of the facts which are needed to adequately advise the client.[248] However, as the number of

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240. *See infra* notes 242-98 and accompanying text. For a discussion of these privileges as they relate to environmental audits, see Terrell E. Hunt & Timothy A. Wilkins, *Environmental Audits and Enforcement Policy*, 16 HARV. ENVTL. L. REV. 365, 376-92 (1992); Edmund B. Frost et al., *Environmental Audits and Litigation Risks*, C900 A.L.I.-A.B.A. 377, 383-98 (1994), and Linda Richenderfer & Neil R. Bigioni, *Going Naked into the Thorns: Consequences of Conducting an Environmental Audit Program*, 3 VILL. ENVTL. L.J. 71, 84-86 (1992).

241. *See supra* notes 242-98 and accompanying text.

242. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (citation omitted).

243. 89 F. Supp. 357 (D. Mass. 1950).

244. *Id.* at 358-59. *See also* Hunt & Wilkins, *supra* note 240, at 376-77.

245. United States v. Chevron U.S.A., Inc., No. 88-6681, 1989 WL 121616, at *6 (E.D. Pa. Oct. 16, 1989).

246. *Id.* ("[I]t is not enough to assert the privilege merely because an attorney was present or was one of the parties to whom the communication was made."). *See also* Hunt & Wilkins, *supra* note 240, at 379.

247. Frost et al., *supra* note 240, at 385.

248. *Id.*

people with access to the audit report increases, the possibility increases that the requirement for confidentiality will be breached.[249] Therefore, besides the attorney, all other parties involved must be clients or the privilege would be waived because the audit was not treated as confidential.[250]

When the client is a corporation, the privilege can be waived by the management of the corporation[251] through either words or actions that indicate a desire to forego the privilege.[252] It can also be lost by partially disclosing the information that would, in turn, make it unfair to allow the privilege to be invoked later.[253] For this reason, any disclosure of information to others, such as employees whose responsibilities do not require that they have the information, could result in the privilege being waived.[254]

Finally, while the communication itself is privileged, the underlying facts are not. A client cannot be forced to reveal what was said or written to one's own attorney "'but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.'"[255] Therefore, if a company performs an audit and then shares the results with an attorney to obtain advice, the communication would be privileged but not the facts contained within the report.

While the attorney-client privilege can provide protection to any legal advice regarding compliance issues identified through an audit, it is very limited in protecting the audit itself. However, if the audit focuses only on specific violations and related facts, the argument that the document was created to receive legal advice and, therefore, should be fully protected, may be strengthened.[256]

B. Work Product Doctrine

In 1947, the United States Supreme Court decided *Hickman v. Taylor*[257] and recognized the work product doctrine. In *Hickman*, the problem concerned protecting a lawyer's work while balancing the interests of "reasonable and necessary inquiries."[258] The policy underlying this doctrine is that "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel."[259]

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249. *See* TRUITT ET AL., *supra* note 1, at 49 n.28.

250. *See id.*

251. KENNETH S. BROUN ET AL., MCCORMACK ON EVIDENCE 130 (John W. Strong ed., 4th ed. 1992).

252. *Id.*

253. *Id.*

254. Hunt & Wilkins, *supra* note 240, at 380.

255. Upjohn Co. v. United States, 449 U.S. 383, 396 (1981) (quoting City of Philadelphia v. Westinghouse Electric Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962)).

256. Hunt & Wilkins, *supra* note 240, at 382.

257. 329 U.S. 495 (1947).

258. *Id.* at 497.

259. *Id.* at 510. *See also* Frost et al., *supra* note 240, at 387.

The Federal Rules of Civil Procedure have incorporated this privilege into Rule 26(b)(3). This Rule provides absolute protection for "the mental impressions, conclusions, opinions, or legal theories of an attorney . . . ."[260] However, "documents and tangible things . . . prepared in anticipation of litigation . . . [are discoverable] only upon a showing that the party seeking discovery has substantial need of the materials . . . and . . . is unable without undue hardship to obtain the substantial equivalent . . . by other means."[261]

Rule 26(b)(3) first requires that the document be "prepared in anticipation of litigation."[262] This does not require an enforcement or other type of legal action to have actually begun, but an action shall be "'imminent'"[263] or "'fairly foreseeable.'"[264] Generally, "the corporation must be legitimately concerned that some environmental, health, or safety violation or condition is about to be discovered and that, as a consequence, the government or some private party will bring enforcement proceedings or suit in the near future."[265] However, reports that are prepared merely to avoid the possibility of litigation are not protected.[266] Further, the document will not be protected if it is prepared as a normal business activity.[267]

Unfortunately, with regard to this doctrine, audits are not generally prepared in response to pending litigation.[268] Therefore, the more common it is for an entity to perform an audit, the more likely it will be viewed as a normal business activity and thus not protected by the work product doctrine. However, the more closely the audit is tied to an event that could reasonably result in litigation, the likelihood that the results of the audit would be protected by the doctrine improve.[269]

Even if the material is shielded by this doctrine, the protection is not absolute.

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260. FED. R. CIV. P. 26(b)(3). *See also* Frost et al., *supra* note 240, at 387.

261. FED. R. CIV. P. 26(b)(3).

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Id. See also Frost et al., *supra* note 240, at 387; BROUN ET AL., *supra* note 251, at 137-38 (discussing the provisions of this rule); Hunt & Wilkins, *supra* note 240, at 383-84.

262. FED. R. CIV. P. 26(b)(3).

263. Hunt & Wilkins, *supra* note 240, at 384 (quoting Enforce Admin. Subpoenas of SEC v. Coopers & Lybrand, 98 F.R.D. 414, 416 (S.D. Fla. 1982)).

264. *Id.* (quoting SEC v. Worldwide Coin Investments, Ltd., 92 F.R.D. 65, 66 (N.D. Ga. 1981)).

265. *Id.*

266. *Id.*

267. *Id.* at 385.

268. Frost et al., *supra* note 240, at 388.

269. Hunt & Wilkins, *supra* note 240, at 385.

Protected documents can still be obtained if the other party has a "substantial need" for the information and "is unable without undue hardship to obtain the substantial equivalent of the materials by other means."[270] Conversely, an attorney's opinion is provided nearly absolute protection.[271] Therefore, the more closely the audit is characterized as conveying legal opinions instead of factual information, the more likely the document will be protected by this doctrine.

As was discussed regarding the attorney-client privilege, the work product doctrine can also be waived if the information is provided to employees who do not need the information.[272] Although limiting the dissemination of audit results is necessary to satisfy the confidentiality requirements of both the work product doctrine and the attorney-client privilege, that limitation also hinders one of the primary benefits of the audit: making employees aware of problems, and, as a result, creating an atmosphere that allows the problems to be corrected.[273] To foster an awareness of compliance issues, employees should know the results of the audit. Unfortunately, that action may constitute a waiver and result in loss of the privilege for the entire document.

C. Self-Evaluation Privilege

A relatively new common law privilege that can potentially protect the results of an environmental audit is the self-evaluation privilege. The policy behind this privilege "is simply that preserving confidentiality enhances the frequency and quality of institutional self-critical analysis, and that the social utility of such self-evaluation exceeds the social utility of compelled disclosure during discovery."[274]

This privilege was recognized in *Bredice v. Doctors Hospital, Inc.*[275] *Bredice* involved an attempt to obtain, through discovery, the reports and minutes of internal staff meetings that might contain information regarding the death of a patient.[276] The court recognized that the staff meetings were established under the requirements of the Joint Commissions on Accreditation of Hospitals and that the only objective of the meetings was to improve care and treatment of patients.[277] The court found that "[c]onfidentiality is essential to effective functioning of these staff meetings . . . ."[278] The court went on to find that it was in the public's interest to preserve the confidentiality of those reviews "[a]bsent evidence of extraordinary

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270. FED. R. CIV. P. 26(b)(3).

271. *See id.*

272. Hunt & Wilkins, *supra* note 240, at 386.

273. *See generally* Hunt & Wilkins, *supra* note 240, at 386 (discussing the effects of disseminating the audit report).

274. Robert J. Bush, *Stimulating Corporate Self-Regulation—The Corporate Self-Evaluative Privilege: Paradigmatic Preferentialism or Pragmatic Panacea*, 87 NW. U. L. REV. 597, 603 (1993) (footnote omitted).

275. 50 F.R.D. 249 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973).

276. *Id.* at 249.

277. *Id.* at 250.

278. *Id.*

circumstances."[279]

Theoretically, the self-evaluation privilege could be very beneficial in protecting environmental audits. However, a significant barrier to the use of this privilege for environmental audits involves the limitations imposed by some courts which "dramatically undermine its applicability to recurring corporate self-regulatory behavior."[280] These limitations include: (1) application of the privilege to only "subjective information;" (2) only covering documents required by governmental regulations; (3) not allowing the protection to apply if the government has subpoenaed the documents; and, (4) finding the privilege was waived if the documents are voluntarily given to the regulatory agency.[281]

In general, the applicability of the self-evaluation privilege has not been universally accepted.[282] This is particularly true in the area of environmental auditing. In *United States v. Dexter Corp.*,[283] the court refused to recognize the privilege in an enforcement action brought under a federal environment law.[284] In *Dexter*, the company asserted the self-evaluation privilege in attempting to protect documents requested by the federal government.[285] The court reasoned that allowing the use of the self-evaluation privilege "would effectively impede the Administrator's ability to enforce the Clean Water Act, and would be contrary to stated public policy."[286]

On the other hand, *Reichhold Chemicals, Inc. v. Textron, Inc.*,[287] recently recognized the privilege in favor of environmental audits. In that case, Reichhold was attempting to protect documents from discovery by defendant companies in a suit to recover response costs under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[288] The court stated that the public interest served by allowing companies to assess their own environmental compliance outweighed the other parties' interests in obtaining the results.[289] The court likened this privilege to the evidence rule regarding subsequent remedial measures.[290] That rule does not allow evidence of actions taken after the fact which, if done earlier, would have lessened the likelihood of

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279. *Id.* at 251.

280. Bush, *supra* note 274, at 609.

281. *Id. See also* Hunt & Wilkins, *supra* note 240, at 390.

282. *Compare* Bush, *supra* note 274, at 597-650 (supporting the self-evaluative privilege) *with* James F. Flanagan, *Rejecting a General Privilege for Self-Critical Analysis*, 51 GEO. WASH. L. REV. 551, 551-82 (1983) (questioning the need for the privilege). *See also* O'Reilly, *supra* note 15, at 133, 147-50 (discussing the self-evaluation privilege in regards to environmental audits).

283. 132 F.R.D. 8 (D. Conn. 1990).

284. *Id.* at 10. *See also* Hunt & Wilkins, *supra* note 240, at 391.

285. 132 F.R.D. at 8.

286. *Id.* at 10.

287. 157 F.R.D. 522, 527 (N.D. Fla. 1994).

288. *Id.* at 524. *See* O'Reilly, *supra* note 15, at 133-34.

289. *Reichhold Chemicals, Inc.*, 157 F.R.D. at 526.

290. *Id.*

the incident occurring, to be used as evidence that the party was negligent.[291] However, the court limited the privilege by requiring that certain criteria be met.[292] The criteria identified were that the information must result from a critical review by the party requesting the privilege; there must be a strong public interest to preserve the free exchange of information; that this exchange would be hindered if discovery of the information was allowed; and the party expected to keep, and did keep, the information confidential.[293] Finally, the court stated that a risk assessment of a proposed action would not be protected, although an analysis of past actions would.[294] This is consistent with the court's position that this privilege is comparable to the evidence rule regarding subsequent remedial measures.

Reichhold Chemicals, Inc., provides hope for the use of the self-evaluation privilege for environmental audits; however, the scope of the privilege is still uncertain. This is particularly true in light of the limitation of the privilege to purely retrospective reviews. If an audit includes an evaluation of a proposed action, such as a plant expansion and the resulting impact on any air pollution or wastewater permits, the privilege would probably not apply to the document if the *Reichhold Chemicals, Inc.*[295] analysis were used. Further, the privilege has not been allowed to shield documents requested by the government.[296] It is also possible that the privilege would not survive a discovery request brought by a private party under the citizen suit provisions found in many environmental laws.[297] Therefore, it may be difficult to protect an environmental audit with the self-evaluation privilege.[298]

III. PROTECTION THROUGH FEDERAL GOVERNMENTAL POLICIES

In addition to the common law privileges, EPA and DOJ have also instituted policies concerning environmental audits.[299] Like the common law privileges, these policies have serious limitations regarding both their ability to protect audit results and to encourage the performance of audits.[300]

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291. FED. R. EVID. 407.

292. *Reichhold Chemicals, Inc.*, 157 F.R.D. at 527.

293. *Id.*

294. *Id.* (The court stated that the "privilege . . . applies only to reports which were prepared after the fact for the purpose of candid self-evaluation and analysis of the cause and effect of past pollution, and of *Reichhold*'s possible role . . . in contributing to the pollution at the site.").

295. *See id.*

296. *See* United States v. Dexter Corp., 132 F.R.D. 8 (D. Conn. 1990). *See also* Peter A. Gish, *The Self-Critical Analysis Privilege and Environmental Audit Reports*, 25 ENVTL. L. 73, 89 (1995).

297. Gish, *supra* note 296, at 89.

298. *Id.*

299. *See infra* notes 301-37 and accompanying text. *See also* O'Reilly, *supra* note 15, at 128-30.

300. *See infra* notes 301-37 and accompanying text.

A. United States Environmental Protection Agency Policy

EPA has developed its own policy regarding environmental audits[301] and has stated its opposition to the state-by-state approach of providing a privilege for these documents.[302] According to EPA, "[o]ne of . . . [its] most important responsibilities is ensuring compliance with federal laws that protect public health and safeguard the environment. . . . But EPA realizes that achieving compliance also requires the cooperation of thousands of businesses and other regulated entities subject to these requirements."[303] For this reason, EPA has issued a final policy statement which provides incentives for companies that "voluntarily discover, disclose, correct and prevent violations of federal environmental requirements."[304]

EPA's final policy contains two significant provisions. The first concerns a penalty policy for companies that perform self-assessments.[305] The second concerns EPA's policy toward the states who have implemented privileges or restrictions on penalties for facilities that perform environmental audits.[306] EPA allows both environmental audits and "compliance management systems that demonstrate due diligence" to be the vehicles by which violations are discovered and reported.[307]

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301. *See* Environmental Auditing Policy Statement, *supra* note 7; Voluntary Environmental Self-Policing and Self-Disclosures Interim Policy Statement, 60 Fed. Reg. 16,875 (1995); Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706 (1995). *See also* Jim Moore & Nancy Newkirk, *Not Quite a Giant Step*, ENVTL. F., May/June 1995, at 16-20 (discussing the development of EPA's policy).

302. Restatement of Policies Related to Environmental Auditing, 59 Fed. Reg. 38,455, 38,459 (1994). *See also* Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, *supra* note 301, at 66,710 (stating its continuing opposition to statutes that create an "evidentiary privilege for environmental audits . . . ." *Id.*).

303. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, *supra* note 301, at 66,706.

304. *Id.* at 66,710. *See also* Moore & Newkirk, *supra* note 301, at 16 (discussing EPA's interim policy); Kass & McCarroll, *supra* note 22, at 46-47 (discussing EPA's interim policy); James T. Banks, *EPA's New Enforcement Policy: At Last, a Reliable Roadmap to Civil Penalty Mitigation for Self-Disclosed Violations*, 26 Envtl. L. Rep. (Envtl. L. Inst.) 10,227 (May 1996) (discussing EPA's policies).

305. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, *supra* note 301, at 66,711-12.

306. *Id.* at 66,712.

307. *Id.* at 66,706-07. The following is a discussion of the due diligence requirements for compliance management systems:

> 'Due diligence' encompasses the regulated entity's systematic efforts, appropriate to the size and nature of its business, to prevent, detect and correct violations through all of the following:
>
> (a) Compliance policies, standards and procedures that identify how employees and

If an entity satisfies all of the identified conditions including systematic and voluntary discovery, disclosure and prompt correction of any identified violation, and cooperates with the government, then the entity is eligible for a reduction of the civil penalty.[308] The reduction involves all of the gravity-based penalty if all

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agents are to meet the requirements of laws, regulations, permits and other sources of authority for environmental requirements;

(b) Assignment of overall responsibility for overseeing compliance with policies, standards, and procedures, and assignment of specific responsibility for assuring compliance at each facility or operation;

(c) Mechanisms for systematically assuring that compliance policies, standards and procedures are being carried out, including monitoring and auditing systems reasonably designed to detect and correct violations, periodic evaluation of the overall performance of the compliance management system, and a means for employees or agents to report violations of environmental requirements without fear of retaliation;

(d) Efforts to communicate effectively the regulated entity's standards and procedures to all employees and other agents;

(e) Appropriate incentives to managers and employees to perform in accordance with the compliance policies, standards and procedures, including consistent enforcement through appropriate disciplinary mechanisms; and

(f) Procedures for the prompt and appropriate correction of any violations, and any necessary modifications to the regulated entity's program to prevent future violations.

Id. at 66,710-11. See *supra* text accompanying note 7 for the definition of an environmental audit.

308. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, *supra* note 301, at 66,711-12.

The conditions for reducing penalties are:

1. Systematic Discovery

The violation was discovered through:

(a) an environmental audit; or

(b) an objective, documented, systematic procedure or practice reflecting the regulated entity's due diligence in preventing, detecting, and correcting violations. The regulated entity must provide accurate and complete documentation to the Agency as to how it exercises due diligence to prevent, detect and correct violations according to the criteria for due diligence outlined in [*supra* note 307]. EPA may require as a condition of penalty mitigation that a description of the regulated entity's due diligence efforts be made publicly available.

2. Voluntary Discovery

The violation was identified voluntarily, and not through a legally mandated monitoring or sampling requirement prescribed by statute, regulation, permit, judicial or administrative order, or consent agreement. For example, the policy does not apply to:

(a) emissions violations detected through a continuous emissions monitor (or alternative monitor established in a permit) where any such monitoring is required;

(b) violations of National Pollutant Discharge Elimination System (NPDES) discharge limits detected through required sampling or monitoring;

(c) violations discovered through a compliance audit required to be performed by the terms of a consent order or settlement agreement.

3. Prompt Disclosure

The regulated entity fully discloses a specific violation within 10 days (or such shorter period provided by law) after it has discovered that the violation has occurred, or may have occurred, in writing to EPA;

4. Discovery and Disclosure Independent of Government or Third Party Plaintiff

The violation must also be identified and disclosed by the regulated entity prior to:

(a) the commencement of a federal, state or local agency inspection or investigation, or the issuance by such agency of an information request to the regulated entity;

(b) notice of a citizen suit;

(c) the filing of a complaint by a third party;

(d) the reporting of the violation to EPA (or other government agency) by a 'whistleblower' employee, rather than by one authorized to speak on behalf of the regulated entity; or

(e) imminent discovery of the violation by a regulatory agency;

5. Correction and Remediation

The regulated entity corrects the violation within 60 days, certifies in writing that violations have been corrected, and takes appropriate measures as determined by EPA to remedy any environmental or human harm due to the violation. If more than 60 days will be needed to correct the violations(s), the regulated entity must so notify EPA in writing before the 60-day period has passed. Where appropriate, EPA may require that to satisfy conditions 5 and 6, a regulated entity enter into a publicly available written agreement, administrative consent order or judicial consent decree, particularly where compliance or remedial measures are complex or a lengthy schedule for attaining and maintaining compliance or remediating harm is required;

6. Prevent Recurrence

The regulated entity agrees in writing to take steps to prevent a recurrence of the violation, which may include improvements to its environmental auditing or due diligence efforts;

7. No Repeat Violations

The specific violation (or closely related violation) has not occurred previously within the past three years at the same facility, or is not part of a pattern of federal, state or local violations by the facility's parent organization (if any), which have occurred within the past five years. For the purposes of this section, a violation is:

(a) any violation of federal, state or local environmental law identified in a judicial or administrative order, consent agreement or order, complaint, or notice of violation, conviction or plea agreement; or

(b) any act or omission for which the regulated entity has previously received penalty mitigation from EPA or a state or local agency.

8. Other Violations Excluded

The violation is not one which (i) resulted in serious actual harm, or may have presented an imminent and substantial endangerment to, human health or the environment, or (ii) violates the specific terms of any judicial or administrative order, or consent agreement.

9. Cooperation

The regulated entity cooperates as requested by EPA and provides such information as is necessary and requested by EPA to determine applicability of this policy.

conditions are satisfied and 75% of the gravity-based penalty if all but the first condition are satisfied.[309] In any event, EPA still intends to recover any penalties associated with the economic benefits an entity obtained due to the violation.[310]

The policy also states that "EPA will not recommend to the Department of Justice or other prosecuting authority that criminal charges be brought . . . where EPA determines that all of the conditions" identified to reduce civil penalties are satisfied and "the violation does not demonstrate or involve: [1] a prevalent management philosophy or practice that concealed or condoned environmental violations; or [2] high-level corporate officials' or managers' conscious involvement in, or willful blindness to, the violation."[311] However, this incentive does not apply to "criminal acts of individual managers or employees."[312] The policy is only directed to the entity, not to the actual individual involved in the criminal act.

The policy also states that "EPA will not request or use an environmental audit report to initiate a civil or criminal investigation of the entity."[313] During a normal investigation, an entity will not be asked to produce the audit.[314] If EPA believes that the entity has committed a violation, it may ask for "any information relevant

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Cooperation includes, at a minimum, providing all requested documents and access to employees and assistance in investigating the violation, any noncompliance problems related to the disclosure, and any environmental consequences related to the violations.

Id.

309. *Id.* at 66,711.

1. No Gravity-Based Penalties

Where the regulated entity establishes that it satisfies all of the conditions [identified in *supra* note 308] of the policy, EPA will not seek gravity-based penalties for violations of federal environmental requirements.

2. Reduction of Gravity-Based Penalties by 75%

EPA will reduce gravity-based penalties for violations of federal environmental requirements by 75% so long as the regulated entity satisfies all of the conditions of [2 through 9 found in *supra* note 308].

Id.

310. *Id.* at 66,712.

Economic Benefit

EPA will retain its full discretion to recover any economic benefit [the facility] gained as a result of noncompliance to preserve a 'level playing field' in which violators do not gain a competitive advantage over regulated entities that do comply. EPA may forgive the entire penalty for violations which meet [the conditions in *supra* note 308] and, in the Agency's opinion, do not merit any penalty due to the insignificant amount of any economic benefit.

Id.

311. *Id.* at 66,711.

312. *Id.*

313. *Id.*

314. *Id.*

to identifying violations or determining liability or extent of harm."[315] Therefore, if a violation is suspected, the Agency may request the audit report if it believes that report contains relevant information. Further, EPA's definition of an environmental audit report "does not include data obtained in, or testimonial evidence concerning" the report.[316]

Although the Agency's position seems to clearly state that it will not request the audit document, it does leave the possibility open.[317] EPA's final policy is an attempt to clarify when it will request an audit. However, the possibility that EPA will request audit documents appears to depend upon whether the Agency believes that an undisclosed violation exists and that the report contains evidence of that violation.

In addition to clarifying EPA's position regarding audits, the policy also restates its firm opposition to the creation "of a statutory evidentiary privilege for environmental audits."[318] The policy states that EPA believes the existence of a privilege for environmental audits could increase the costs of litigation, invite secrecy, and shield factual information.[319]

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315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.* at 66, 710.

319. *Id.*

1. Privilege, by definition, invites secrecy, instead of the openness needed to build public trust in industry's ability to self-police. American law reflects the high value that the public places on fair access to the facts. The Supreme Court, for example, has said of privileges that, '[w]hatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.' United States v. Nixon, 418 U.S. 683 (1974). Federal courts have unanimously refused to recognize a privilege for environmental audits in the context of government investigations. See, e.g., United States v. Dexter, 132 F.R.D. 8, 9-10 (D. Conn. 1990) (application of a privilege 'would effectively impede [EPA's] ability to enforce the Clean Water Act, and would be contrary to stated public policy.')

2. Eighteen months have failed to produce any evidence that a privilege is needed. Public testimony on the interim policy confirmed that EPA rarely uses audit reports as evidence. Furthermore, surveys demonstrate that environmental auditing has expanded rapidly over the past decade without the stimulus of a privilege. Most recently, the 1995 Price Waterhouse survey found that those few large or mid-sized companies that do not audit generally do not perceive any need to; concern about confidentiality ranked as one of the least important factors in their decisions.

3. A privilege would invite defendants to claim as 'audit' material almost any evidence the government needed to establish a violation or determine who was responsible. For example, most audit privilege bills under consideration in federal and state legislatures would arguably protect factual information—such as health studies or contaminated sediment data—and not just the conclusions of the auditors. While the government might have access to required monitoring data under the law, as some industry

Because of its opposition to the states' efforts to create privileges or immunities for audits, the policy details the Agency's position as it relates to states that have created a privilege.[320] The policy states that "states are encouraged to experiment with different approaches that do not jeopardize the fundamental national interest in assuring that violations of federal law do not threaten the public health or the environment, or make it profitable not to comply."[321] To accomplish this objective, EPA retained its ability to bring an action itself

> for violations of federal law that threaten human health or the environment, reflect criminal conduct or repeated noncompliance, or allow one company to make a substantial profit at the expense of its law-abiding competitors. Where a state has obtained appropriate sanctions needed to deter such misconduct, there is no need for EPA action.[322]

Finally, EPA's policy is intended to guide the exercise of prosecutorial discretion.[323] The final policy replaces "any inconsistent provisions in . . . enforcement policies and EPA's 1986 Environmental Auditing Policy Statement."[324]

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commenters have suggested, a privilege of that nature would cloak underlying facts needed to determine whether such data were accurate.

4. An audit privilege would breed litigation, as both parties struggled to determine what material fell within its scope. The problem is compounded by the lack of any clear national standard for audits. The 'in camera' (i.e., non-public) proceedings used to resolve these disputes under some statutory schemes would result in a series of time-consuming, expensive mini-trials.

5. The Agency's policy eliminates the need for any privilege as against the government, by reducing civil penalties and criminal liability for those companies that audit, disclose and correct violations. The 1995 Price Waterhouse survey indicated that companies would expand their auditing programs in exchange for the kind of incentives that EPA provides in its policy.

6. Finally, audit privileges are strongly opposed by the law enforcement community, including the National District Attorneys Association, as well as by public interest groups.

Id.

320. *Id.* at 66,712.

321. *Id.* at 66,710.

322. *Id.*

323. *Id.* at 66,712.

324. *Id.* One such potentially conflicting policy discussed factors influencing EPA's decision whether to pursue an investigation as a criminal action. That policy considers how the facility responded to a violation identified through an audit. Memorandum from Earl E. Devaney, Director, United States Environmental Protection Agency Office of Criminal Enforcement, The Exercise of Investigative Discretion (January 12, 1994) (on file with author). *See also* Kenneth D. Woodrow, *The Proposed Federal Environmental Sentencing Guidelines: A Model For Corporate Environmental Compliance Programs*, [25 Current Developments] Env't Rep. (BNA) 325, 326 (1994) (discussing EPA's policy regarding criminal enforcement).

EPA's policy seeks to create a hospitable climate in which environmental audits can occur. Unfortunately, it does not go far enough. Although the final policy does provide an incentive for doing an environmental audit, companies may decide that the benefit is not worth the potential risk involving full, voluntary disclosure of the violation.

B. Department of Justice Policy

The DOJ has also issued a policy regarding environmental audits. Its policy discusses the factors to consider to determine if a criminal prosecution is warranted for the violation of an environmental statute.[325] This policy attempts to encourage an entity to voluntarily perform audits and disclose violations.[326] Further, the policy was issued to give both the regulated community and federal prosecutors direction in the exercise of prosecutorial discretion in environmental cases so that the discretion is uniformly applied across the country.[327]

Factors that must be considered include: (1) whether the disclosure was complete, voluntary, and made in a timely manner;[328] (2) whether cooperation was

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325. Memorandum from U.S. Department of Justice, Factors in Decisions in Criminal Prosecutions For Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator 1 (1991) (on file with author) ("This document is intended to describe the factors . . . [to be considered] in deciding whether to bring a criminal prosecution . . . so that such prosecutions do not create a disincentive to or undermine the goal of encouraging critical self-auditing, self-policing, and voluntary disclosure.").

326. *Id.*

327. *Id.*

> It is designed to give federal prosecutors direction concerning the exercise of prosecutorial discretion in environmental criminal cases and to ensure that such discretion is exercised consistently nationwide. It is also intended to give the regulated community a sense of how the federal government exercises its criminal prosecutorial discretion with respect to such factors as the defendant's voluntary disclosure of violations, cooperation with the government in investigating the violations, use of environmental audits and other procedures to ensure compliance with all applicable environmental laws and regulations, and use of measures to remedy expeditiously and completely any violations and the harms caused thereby.

Id. at 1-2.

328. *Id.* at 3. Regarding this element,

> Consideration should be given to whether the person came forward promptly after discovering the noncompliance, and to the quantity and quality of information provided. Particular consideration should be given to whether the disclosure substantially aided the government's investigatory process, and whether it occurred before a law enforcement or regulatory authority (federal, state or local authority) had already obtained knowledge regarding noncompliance.

Id.

prompt and complete;[329] (3) whether a compliance program existed to correct problems and, if so, to what extent;[330] (4) how pervasive the noncompliance was;[331] (5) whether an effective internal disciplinary program was present; [332] and (6) whether the facility attempted to achieve compliance.[333]

While these factors provide internal guidance regarding the instigation of a criminal enforcement action on the federal level, the actions a prosecutor can ultimately take are not limited.[334] The DOJ policy does not indicate the weight federal prosecutors should place on each of these factors.[335] For these reasons, the policy statement does not provide any guarantee that the results of a company's audit will not be used against it. Further, the policy does not apply in federal civil actions, state actions, or citizen suits.[336]

An entity's active environmental audit program may be a factor in reducing an enforcement action from a criminal to a civil violation. To further lessen the possibility of a criminal prosecution, an entity should voluntarily provide the DOJ with any relevant information. Therefore, notwithstanding the fact that the DOJ policy statement may lack ironclad protection, it does give some indication that the results of an environmental audit may not be totally vulnerable if the entity voluntarily comes forward. Unfortunately, by actively attempting to satisfy these factors, an entity may end up waiving other potential common law or statutory privileges.[337]

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329. *Id.* at 3-4 (This can include whether "all relevant information (including the complete results of any internal or external investigation . . .)" was provided.).

330. *Id.* at 4 ("Particular consideration should be given to whether the compliance or audit program includes sufficient measures to identify and prevent future noncompliance, and whether the program was adopted in good faith and in a timely manner.").

331. *Id.* at 5 (This can "indicate systemic or repeated participation in or condonation of criminal behavior. It may also indicate the lack of a meaningful compliance program.").

332. *Id.* (Consideration should include "whether there was an effective system of discipline for employees who violated company environmental compliance policies. Did the disciplinary system establish an awareness in other employees that unlawful conduct would not be condoned?").

333. *Id.* at 5-6.

> The promptness and completeness of any action taken to remove the source of the noncompliance and to lessen the environmental harm resulting from the noncompliance should be considered. Considerable weight should be given to prompt, good-faith efforts to reach environmental compliance agreements with federal or state authorities, or both. Full compliance with such agreements should be a factor in any decision whether to prosecute.

Id.

334. *Id.* at 14-15.

335. *See* Richenderfer & Bigioni, *supra* note 240, at 90. *See also* Hunt & Wilkins, *supra* note 240, at 399.

336. Richenderfer & Bigioni, *supra* note 240, at 91. *See also* Woodrow, *supra* note 324, at 328.

337. *See* Hunt & Wilkins, *supra* note 240, at 397-99 (stating that attempting to satisfy DOJ's policies can result in waiver of common law privileges).

IV. SUMMARY OF THE PROTECTION GRANTED BY THE STATES

The policy underlying the various state statutes is that by allowing regulated entities to assess their own environmental compliance status in at least a partially protected manner, they will be inclined to identify problems and correct them. This not only helps the entity to comply with the law but also improves the environment. The privilege created by the states adds important protection to the existing common law privileges for these documents. However, that protection is not absolute.

Entities that choose to perform environmental audits in any of these states must carefully review the applicable statutes to verify that the areas included in the review fall within the scope of the privilege. If the area to be audited is not covered by the applicable statute, then the entity must rely on the common law privileges to protect the document. Furthermore, some of the states require that any documents developed as a result of the audit be labeled with a specific title. Without that title on the documents, the privilege may be forfeited.

The audit document can contain various information. However, none of the statutes allow the protection of information which the facility is required to provide under a permit, order, regulation, or rule. Therefore, all of the information uncovered during the audit must be evaluated to determine if any of it triggers a reporting requirement or must otherwise be made available to the government. If any of it does, that information cannot be protected and, if included in the report, could threaten the applicability of the privilege to the entire document. For this reason, entities must strenuously negotiate with the government to prevent the imposition of additional reporting requirements in permits and orders not specifically required through an independent regulation. Every new reporting requirement creates an additional area that cannot be protected by the privilege.

Provided that the audit has been structured to cover only appropriate areas, the privilege created by most of the statutes can still be lost if the facility does something that could be interpreted as a waiver. Therefore, all audit reports must be carefully managed to maintain confidentiality and thus protect the privilege. Many of the statutes also allow for the privilege to be lost if the audit reveals problems that were not promptly corrected. The burden is on the regulated entity to prove it acted expeditiously to correct problems and, failing that, the information may not be protected. For this reason, it is critical to not begin an audit unless management has both the desire and the resources to correct any problems identified.[338] If either are lacking, performing an audit may increase liability in subsequent litigation.[339]

Concerning waiver and the failure to address identified problems, it is the regulated entity's actions that will determine whether or not the privilege will be lost. Therefore, audits must be planned carefully. If the performance of the audit or the handling of the resulting report is careless, the privilege may be forfeited.

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338. Weinstock, *supra* note 14, at 76. *See also* O'Reilly, *supra* note 15, at 121-23.

339. *See* Woodrow, *supra* note 324, at 328.

In addition to the factors under the entity's control, some states allow the privilege to be revoked in a criminal proceeding if the information cannot otherwise be easily reproduced. This is similar to the circumstances under which an item protected by the work product doctrine can be discovered. In Colorado, this factor applies in all types of actions. Some of the states also allow the privilege to be revoked if the audit is done after the entity knows an enforcement action is underway. In addition, some of the statutes revoke the privilege if the audit contains evidence of a serious threat off-site to the environment or to the public health.

Finally, some of the statutes have granted immunity from civil, administrative, and criminal penalties in certain circumstances to regulated entities that perform an audit and voluntarily notify the government of a violation. This provision is an important benefit missing from the other state statutes and should further encourage the performance of audits.

One of the major drawbacks to each of the state statutory privileges is the fact that they are applicable only at the state level.[340] EPA and DOJ policies indicate that the results of an audit are discoverable by the federal government. Further, the EPA will more closely scrutinize enforcement actions in states with a privilege and may be more likely to file an action if it believes the privilege is inappropriately shielding a regulated entity.[341] The disclosure of information, including information from an audit, is important under EPA and DOJ policies in determining the type and extent of enforcement actions; however, that act can result in the state privilege being waived. The potential conflict between the state privileges and federal government policies place entities that audit in an untenable position.

V. RECOMMENDATION AND CONCLUSION

Environmental audits provide a formidable weapon in the ongoing battle to achieve and maintain compliance with environmental laws. A properly conducted audit should involve a hard look at the physical portion of the facility as well as its records to identify both acceptable and unacceptable conditions. The audit can mimic a governmental inspection or go beyond that to include the review of information and practices that are not required by any regulation but which an entity has internally determined to be important.

The actual audit, however, is not the most valuable aspect of the program. Asking the question is only the beginning. The answer, and what is done in response to that answer, constitutes the real benefits of this program.[342] Conversely, an audit will not provide any benefit to an entity if the internal commitment to correct identified problems is not present.

An environmental audit can provide valuable information to an entity

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340. O'Reilly, *supra* note 15, at 132, 139-41.

341. Jennifer M. Porter et al., *Recent Developments in Energy Resource Law*, 30 TORT & INS. L.J. 340, 343 (1995).

342. O'Reilly, *supra* note 15, at 125.

regarding its compliance status. However, if the report is not protected by a privilege, it can provide that same information to any other group that is involved in legal action with the entity.

The protection provided by the common law privileges are only effective in specific situations. For the attorney-client privilege to even potentially apply, the audit must be crafted so that an attorney can use the information in providing legal advice. Also, the protection provided by the work product doctrine will only apply if there is a threat of litigation. Finally, the self-evaluation privilege is potentially applicable, but has not been widely accepted. The self-evaluation privilege is premised on the belief that the benefit to society of performing a critical review to identify and correct deficiencies outweighs the value of allowing the results to be discovered. This same premise underlies the state statutes.

The statutes provide some protection to audits at the state level; however, that protection is not comprehensive nor is it applicable in all types of actions. Therefore, although the statutes are helpful, standing alone, they are insufficient to completely protect these documents. To remedy this dilemma, Congress should pass a federal law regarding environmental audits which standardizes the confidentiality for the resulting documents. Until that is done, the only protection at the federal level, other than common law privileges, rests on the policy of the agency involved and the willingness of both the investigator and prosecutor to adhere to that policy.

Federal legislation will provide entities with a clearer understanding of the situations under which audits can be protected regardless of whether subsequent action is at the state or federal level. As a result, more entities should be encouraged to undertake a voluntary audit program. Further, a single privilege statute will remove possible confusion for multi-state entities who perform audits. By enacting a federal statute that preempts the state statutes, entities will not be forced to structure their audit program to satisfy different statutes with different requirements by creating separate programs for each state in which the entity operates. At this time, if a party should sue the "corporation in federal court under diversity jurisdiction, the judge must carefully consider whether state law controls the claimed privilege"[343] and, if so, which state's law.[344]

Until a federal law is passed, entities must continue to structure their audits to satisfy not only the applicable state statutory privilege but also the common law privileges. In doing so, the regulated entity will improve the potential to shield the audit in any type of proceeding, whether it is initiated by the government or by a private party. At the state level, legislatures should continue to pass their own laws establishing a privilege at least until the federal government responds with

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343. Gish, *supra* note 296, at 78.

344. *See* Porter et al., *supra* note 341, at 343. *See also* O'Reilly, *supra* note 15, at 152-54 (stating that a federal statute could "systematize the state privilege" and the benefit of the privilege in a civil action is highest if it applies in either federal or state court); Hogue, *supra* note 22, at 883 ("Coleman said uniform federal legislation is needed given the variability among state privilege laws." Quoting Mike Coleman, Executive Director of the Oklahoma Department of Environmental Quality.).

a uniform statute.

Any future legislation, whether at the state or federal level, should, like many of the statutes, mirror the Oregon model with certain modifications. The statutes should continue to place many of the factors which can result in the loss of the privilege in a civil or administrative action squarely in the control of the entity performing the audit. This will encourage entities to perform audits because, in a sense, they will control their own destiny regarding the use of the document in enforcement proceedings. To counterbalance an entity's control, the legislation should also provide for the privilege to be revoked if it is claimed fraudulently, if the information does not fall within the scope of the privilege, or if an entity fails to take prompt action to correct the problems that were identified. This will motivate entities to correct problems promptly in order to maintain the viability of the privilege.[345]

In addition to the factors listed above, a federal statute or any new state statute should include a provision similar to some of the existing state statutes that revoke the privilege if the document contains information regarding a serious threat to public health or the environment. Although that specific factor would not be in the control of the entity performing the audit, it would foster the basic goal of improving the environment.

The statute should also allow a regulated entity to correct compliance problems which may be identified. However, this should be balanced against the ultimate goal of protecting public health and the environment. Therefore, if the audit identifies a threat to the public which is significant, that fact should outweigh the entity's interest in protecting the audit results and, therefore, the privilege should be revoked. Any future statutes should also follow Oregon's model regarding access to the audit report in a criminal proceeding, burden of proof, and materials not subject to the privilege. Further, statutes should include a provision similar to the one found in the Indiana and Texas laws that prohibit the government from creating new reporting requirements to circumvent the privilege.

Finally, the provision allowing an entity to come forward without the fear of sanctions, found in some of the current statutes, should also be included. This provision should help improve the environment through enhanced compliance and foster an air of cooperation between industry and government.

An environmental audit, if properly performed, can provide an entity with valuable information. It can highlight successes and identify weaknesses. If the regulated entity uses the results of the audit to address any deficiencies, it can reduce its potential liability and improve overall compliance. Society also benefits from this action because the environment is preserved.

Although the state statutory privileges are not absolute, they do provide some additional protection to environmental audits in certain circumstances. This protection is strengthened if the audit is designed and performed with the limitations of the applicable statute in mind. Therefore, although the existing state statutes are not suits of armor in and of themselves, they provide a more substantial cloak to the potential exposure of the audit document than was

345. *See* O'Reilly, *supra* note 15, at 142 n.106.

provided to the Emperor by his new clothes.[346]

346. ANDERSEN, *supra* note 29. For a similar analysis of the benefit of protecting environmental audits which also includes information regarding the states included in this Note, see Kirk F. Marty, *Moving Beyond the Body Count and Toward Compliance: Legislative Options for Encouraging Environmental Self-Analysis*, 20 VT. L. REV. 495 (1995) which was published during the publication process of this Note.

THE SUPREME COURT ASSAULTS STATE DRUG TAXES WITH A DOUBLE JEOPARDY DAGGER: DEATH BLOW, SERIOUS INJURY, OR FLESH WOUND?

CHARLES K. TODD, JR.*

INTRODUCTION

Accusing the Supreme Court of the United States of a lawless act, especially one of a criminal nature, is an accusation fraught with reservation. This Note suggests that the Court's action on June 6, 1994, warrants such an accusation. In the hallowed halls of the Supreme Court building, five Justices picked up a "dagger" and looked for past Supreme Court cases they could use for "accomplices." Although not all the accomplices were willing, the Justices relentlessly pursued their support in the "attack." The victim was unsuspecting, well-liked, and well-supported by the community. But armed with its "double jeopardy dagger" and a "motive" for the crime,[1] the Court wounded the victim in a possible fatal slashing attack; the victim—state drug taxes. Although one may find this "crime scene" analogy extreme, this Note suggests that the Court's recent use of the Double Jeopardy Clause to strike down state drug taxes warrants such extremity.

Because this Note enters the rocky waters of double jeopardy jurisprudence and its recent application to state excise taxes on drugs, it is only fair to advise the reader of Chief Justice Rehnquist's characterization of the jurisprudence in this area as a "veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator."[2]

In *Department of Revenue of Montana v. Kurth Ranch*,[3] the Supreme Court held Montana's Dangerous Drug Tax Act[4] violative of the Double Jeopardy Clause,[5] and further muddied the already cloudy waters regarding the nature and scope of double jeopardy violations. In *Kurth Ranch*, Montana's law enforcement officers raided the Kurths' family farm, arrested them, and confiscated marijuana plants. After the Kurths pled guilty to criminal drug charges, Montana's Department of Revenue attempted, in a separate proceeding, to collect a state tax imposed on the possession and storage of dangerous drugs. The Kurths, then in

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1. *See* United States v. Halper, 490 U.S. 435 (1989) (holding that a civil sanction is punishment for double jeopardy purposes).

2. Albernaz v. United States, 450 U.S. 333, 343 (1981).

3. 114 S. Ct. 1937 (1994).

4. MONT. CODE ANN. §§ 15-25-101 to -123 (1987) (The Act is cited as it existed at the time of the *Kurth Ranch* decision. It was revised in 1993, with §§ 15-25-103 to -110 and §§ 15-25-116 to -120 reserved).

5. U.S. CONST. amend. V.

bankruptcy proceedings, objected to Montana's proof of claim for the tax and challenged the tax's constitutionality. The bankruptcy court held the assessment on the marijuana was a form of double jeopardy,[6] invalid under the Federal Constitution, and the district court affirmed.[7] The court of appeals reasoned that under *United States v. Halper*[8] the sanction or tax imposed must be rationally related to the damages the government suffered and thus the tax was unconstitutional as applied to the Kurths because Montana refused to offer such evidence.[9] Montana filed petition for writ of certiorari, which the Court granted.[10] The United States Supreme Court, in a five-four decision, with three separate dissenting opinions, held the tax as imposed under Montana's Dangerous Drug Tax Act[11] to be "punishment" for purposes of double jeopardy analysis and thus unconstitutional as pursued in separate proceedings.[12]

The Supreme Court had only recently tested the elasticity of the Double Jeopardy Clause by expanding double jeopardy protection into civil matters.[13] In the *Kurth Ranch* decision, the Court again armed itself with the Double Jeopardy Clause and allowed a tax-free playground for those involved in illegal drugs. The Supreme Court for the first time invited tax legislation into its growing arsenal used to defend the ambiguous state of double jeopardy protections, and thereby strengthened their immunity from solid interpretation.[14]

The purpose of this Note is to examine the *Kurth Ranch* decision, the "scene of attack," and the possible harm the Court has inflicted with its "double jeopardy dagger," especially its effect on the future of state excise taxes on illegal drugs. In holding Montana's drug excise tax punishment for the purposes of double jeopardy analysis, the Supreme Court determined that there were "unusual features"[15] that set Montana's tax apart, thereby leaving behind "bandages" that

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6. *In re* Kurth Ranch, 145 B.R. 61 (Bankr. D. Mont. 1990), *aff'd*, No. CV-90-084-GF, 1991 WL 365065 (D. Mont. Apr. 23, 1991), *aff'd*, 986 F.2d 1308 (9th Cir. 1993), *cert. granted*, Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 38 (1993), *aff'd*, 114 S. Ct. 1937 (1994).

7. *In re* Kurth Ranch, No. CV-90-084-GF, 1991 WL 365065 (D. Mont. Apr. 23, 1991), *aff'd*, 986 F.2d 1308 (9th Cir. 1993), *cert. granted*, Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 38 (1993), *aff'd*, 114 S. Ct. 1937 (1994).

8. 490 U.S. 435 (1989).

9. *In re* Kurth Ranch, 986 F.2d 1308 (9th Cir. 1993), *cert. granted*, Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 38 (1993), *aff'd*, 114 S. Ct. 1937 (1994).

10. Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 38 (1993), *aff'd*, 114 S. Ct. 1937 (1994).

11. MONT. CODE ANN. §§ 15-25-101 to -123 (1987) (The Act is cited as it existed at the time of the *Kurth Ranch* decision. It was revised in 1993, with §§ 15-25-103 to -110 and §§ 15-25-116 to -120 reserved).

12. *Kurth Ranch*, 114 S. Ct. at 1948-49.

13. United States v. Halper, 490 U.S. 435 (1989).

14. *Kurth Ranch*, 114 S. Ct. at 1945 (acknowledging the Court had "never held that a tax violated the Double Jeopardy Clause").

15. *Id.* at 1947.

states might utilize to "patch the wounds" left on state drug taxes. Whether this will be enough for their survival against future double jeopardy attacks is an area of uncertainty.

Part I of this Note discusses the history of state drug taxes and the previous constitutional attacks they have incurred, as well as the history and progression of the Double Jeopardy Clause.[16] Part II analyzes and critiques the *Kurth Ranch* decision; and Part III predicts the possible impact of applying *Kurth Ranch* both to state drug taxes and to other areas, such as taxation on illegal activities in general. With specific emphasis on the Indiana Controlled Substance Excise Tax (CSET),[17] Part IV recommends some model provisions that states should use to revise existing statutes or to draft new statutes in order to avoid the fate of Montana's drug tax. The proposed revisions to state drug tax statutes emphasize the terminology and elements that have caused constitutional conflict, especially in reference to a double jeopardy attack. This is further highlighted by examining the Indiana Supreme Court's recent decisions concluding that Indiana's drug tax is punishment for purposes of double jeopardy protection.[18]

I. HISTORY OF STATE DRUG TAXES

A. Taxation of Illegal Activities in General

It is well accepted that the states have the power to tax their citizens provided it is done within the confines of the Fourteenth Amendment.[19] Furthermore, legislatures have been given "broad latitude in creating classifications and distinctions in tax statutes."[20]

The Revenue Act of 1913 imposed taxes on "lawful business carried on for gain or profit."[21] The Act was amended three years later by deleting the word "lawful,"[22] which eliminated any explicit distinction between legal and illegal business for tax purposes. Since this amendment, the Court has on several

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16. This discussion of the Double Jeopardy Clause is comparatively brief given that other notes and articles primarily focus on double jeopardy. *See generally* Donald E. Burton, Note, *A Closer Look at the Supreme Court and the Double Jeopardy Clause*, 49 OHIO ST. L.J. 799 (1988); Peter J. Henning, *Precedents in a Vacuum: The Supreme Court Continues To Tinker with Double Jeopardy*, 31 AM. CRIM. L. REV. 1 (1993).

17. IND. CODE §§ 6-7-3-1 to -17 (1993).

18. Bryant v. State, 660 N.E.2d 290 (Ind. 1995); Clifft v. Indiana Dep't of State Revenue, 641 N.E.2d 682 (Ind. Tax 1994), *aff'd in part, rev'd in part*, 660 N.E.2d 310 (Ind. 1995) (holding that the CSET is punishment for double jeopardy purposes pursuant to the *Kurth Ranch* decision). *See infra* discussion Part IV.

19. U.S. CONST. amend. XIV.

20. Regan v. Taxation with Representation of Wash., 461 U.S. 540, 547 (1983).

21. *See* Frank A. Racaniello, Note, *State Drug Taxes: A Tax We Can't Afford*, 23 RUTGERS L.J. 657, 658 (1992) (citing Revenue Act of 1913, Pub. L. No. 16, § 2B, 38 Stat. 114, 167 (amended 1916)).

22. *Id.* (citing Revenue Act of 1916, Pub. L. No. 271, § 2(a), 39 Stat. 756, 757).

occasions upheld the taxing of illegal activities. In *United States v. Sullivan*,[23] the Court, looking at a Fifth Amendment challenge to a law requiring the defendant to file an income tax return even though his income was obtained illegally, upheld the taxing of illegal income.[24] In *James v. United States*,[25] authored by Chief Justice Warren, the Court embraced the taxing of illegal income, noting that to do otherwise would promote an injustice on the honest taxpayer.[26] The Supreme Court recognized that, in general, it is beyond comprehension to allow an individual to avoid taxes simply because he or she is participating in illegal activities.[27]

The federal government has imposed taxes on specific illegal activities such as gambling[28] and drugs.[29] The Marijuana Tax Act[30] required the purchaser of marijuana to report to the Internal Revenue Service, pay an occupational tax, register as someone who deals in marijuana, and pay a one hundred dollar per ounce tax.[31] The Supreme Court's earlier views[32] on such laws culminated in the Court's holding in *Leary v. United States*[33] that the federal drug tax violated a person's Fifth Amendment right against self-incrimination.[34] The demise of the tax was not due to its taxation of illegal gain, instead it was struck down because the information provided by the taxpayer was made available to and used by law

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23. 274 U.S. 259 (1927).

24. *Id.* at 263-64 (Holmes, J.) (noting it would "be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime").

25. 366 U.S. 213 (1961).

26. *Id.* The Court noted that failing to tax the illegal income would lead to the "injustice of relieving embezzlers of the duty of paying income taxes on the money they enrich themselves with through theft while honest people pay their taxes on every conceivable type of income." *Id.* at 221.

27. *See* United States v. Constantine, 296 U.S. 287, 293 (1935) (noting "[i]t would be strange if one carrying on a business the subject of an excise should be able to excuse himself from payment by the plea that in carrying on the business he was violating the law"). *See also* Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 1937, 1945 (1994) (citing Marchetti v. United States, 390 U.S. 39, 44 (1968), *cert. granted and judgment vacated*, Picioli v. United States, 390 U.S. 202 (1968); James v. United States, 366 U.S. 213 (1961)).

28. 26 U.S.C. §§ 4401, 4411 (1994).

29. 26 U.S.C. §§ 4741-4475 (1954) (repealed 1970).

30. *Id.*

31. *Id.* The tax actually differentiated between those registering as dealers ($1 per ounce) and those not registering as dealers ($100 per ounce).

32. *See* Haynes v. United States, 390 U.S. 85 (1968); Grosso v. United States, 390 U.S. 62 (1968); Marchetti v. United States, 390 U.S. 39 (1968), *cert. granted and judgment vacated*, Piccioli v. United States, 390 U.S. 202 (1968).

33. 395 U.S. 6 (1969).

34. This self-incrimination attack on the federal drug tax has continued to be an area of assault from opponents of state drug taxes. *See* Ann L. Iijima, *The War on Drugs: The Privilege Against Self-Incrimination Falls Victim to State Taxation of Controlled Substances*, 29 HARV. C.R.-C.L. L. REV. 101 (1994).

enforcement against the purchaser.[35]

Prior to *Kurth Ranch*, the constitutionality of taxing illegal gains and activities was beyond serious question. Although the Court in *Kurth Ranch* recognized prior holdings that supported the taxation of illegal activities, it ignored the practicality of doing so and ultimately used the illegality of the activity as an unusual feature to support its finding that the tax was a punitive measure.[36]

B. Development of State Excise Taxes on Drugs

With the Supreme Court's decision in *Leary*,[37] the taxing of illegal drug trafficking was put on hold. As the use and sale of illegal drugs escalated to epidemic proportions and progressively became a political football, the various branches and agencies of government increased their assault on illegal drugs with both rhetoric and concrete action. These increased efforts have been accompanied, not surprisingly, by increased costs.[38] Despite Ronald Reagan's "war on drugs" in the early 1980s, the United States has seen the illegal drug trade grow into a multi-billion dollar business.[39] Whether an advocate for punishment and law enforcement oriented solutions or for a treatment-oriented approach, all involved would agree that the monetary cost of the war is high.

Some states began enacting their own state drug taxes in the 1980s,[40] while others have done so only recently,[41] and still others have elected not to enact state drug taxes at all.[42] Arguably, state drug taxes gained in popularity due, in part, to

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35. *Leary*, 395 U.S. at 28-29.

36. Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 1937, 1945-47 (1994).

37. 395 U.S. 6 (1969) (federal drug tax violative of the self-incrimination protection of the Fifth Amendment).

38. *See* John A. Powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, the Constitution and the Black Community,* 24 U.C. DAVIS L. REV. 557, 567 (1991) ("[I]n its fiscal 1991 budget, the Bush Administration sought $10.6 billion and received $10.4 billion to continue the war on drugs."). *See generally* Larry Gostin, *An Alternative Public Health Vision for a National Drug Strategy: "Treatment Works,"* 28 HOUS. L. REV. 285 (1991) (discussing many health associated costs in the use of illegal drugs).

39. *See* Powell & Hershenov, *supra* note 38, at 566 (noting that common estimates of annual black market sales range from $80 to $100 billion a year). *See also Kurth Ranch*, 114 S. Ct. at 1953 (O'Connor, J., dissenting) ("The State and Federal Governments spend vast sums on drug control activities," indicating approximately $27 billion spent in fiscal 1991.) (citing U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FACT SHEET: DRUG DATE SUMMARY 5 (Apr. 1994)).

40. Arizona (1983); South Dakota (1984); Florida (1984); and Minnesota (1986). *See* Christina Joyce, *Expanding the War Against Drugs: Taxing Marijuana and Controlled Substances*, 12 HAMLINE J. PUB. L. & POL'Y 231, 231 (1991).

41. IND. CODE §§ 6-7-3-1 to -17 (1993). Effective in 1992, Indiana's drug tax places Indiana as one of the more recent states to pass some form of drug tax legislation.

42. States choosing not to enact state excise taxes on drugs include Alaska, Arkansas, and Ohio.

the federal government's efforts in collecting drug related tax revenues.[43]

Although states use various schemes of taxation,[44] most statutes provide that certain persons pay assessments, normally taking the form of excise taxes, on specified types and amounts of controlled substances based on possession or sale.[45] While many states have imposed excise taxes on illegal drugs,[46] some have relied only on a general sales tax statute.[47] Of the states that have specific drug taxes, some states levy excise taxes on controlled substances, while others require a licensing fee. Still other states have required drug possessors or dealers to purchase tax stamps that are to be permanently placed on the controlled substances. Of the three different taxation methods, a licensing fee, a flat excise tax, or an excise tax paid by purchasing stamps, the purchasing of stamps is the most common.[48]

In 1983, Arizona became the first state to legislate a controlled substance tax.[49] Other states have followed by requiring that drug stamps be affixed to the drugs. Still others have chosen instead to levy state excise taxes. One example of the latter is Indiana, whose Controlled Substance Excise Tax[50] went into effect on July 1, 1992.[51]

Indiana's CSET imposes a tax that is dependent upon both the weight and the type of the controlled substance.[52] Although only recently passed by the Indiana legislature, the CSET has already come under attack. The attacks are based on historical approaches to attacking drug taxes[53] as well as the double jeopardy attack encouraged by the *Kurth Ranch* decision.[54]

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43. For example, section 280E of the federal tax code denies income tax deductions for expenses incurred in conducting illegal drug activity. 26 U.S.C. § 280E (1994). State drug taxes also provide a means to increase tax revenues and offset the tax burden created by the various aspects of drug enforcement and treatment.

44. *See generally* Alan D. Gould, *Criminal Law and the Fifth Amendment: Taxation of Illegal Drugs*, 1989 ANN. SURV. AM. L. 541 (1991) (comparing various approaches states have taken in taxing illegal drugs).

45. *See generally* Iijima, *supra* note 34.

46. Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 1937, 1954 (1994) (O'Connor, J., dissenting) (citing 22 states that have taxed at approximately the same rate as Montana). *See also* Iijima, *supra* note 34, app. at 136 (comparing the various statutory violations on state drug taxes).

47. MICH. COMP. LAWS ANN. §§ 205.51 to .78 (West 1986 & Supp. 1994). *See generally* Gould, *supra* note 44.

48. *See* Racaniello, *supra* note 21, at 664.

49. ARIZ. REV. STAT. ANN. §§ 42-1203.01 to -1212.02 (West 1991 & Supp. 1994). *See also* Joyce, *supra* note 40, at 231.

50. IND. CODE §§ 6-7-3-1 to -17 (1993).

51. Indiana's CSET does not require the purchase of stamps. *Id.*

52. *Id.* § 6-7-3-6(a).

53. *See* discussion *infra* Part I.C.

54. Clifft v. Indiana Dep't of State Revenue, 641 N.E.2d 682 (Ind. Tax 1994), *aff'd in part, rev'd in part*, 660 N.E.2d 310 (Ind. 1995) (holding that the CSET does not violate the privilege

C. Previous Attacks on State Drug Taxes

State drug taxes have undergone various attacks since their inception. The most common attack, which has met with some success and much support,[55] has been the Fifth Amendment privilege against self-incrimination.[56]

1. Self-Incrimination Attack.—Self-incrimination protection has two main components: first, it prohibits the government from coercing individuals to furnish self-incriminating statements; and second, it forbids the government from using any coerced, self-incriminating information in a criminal trial.[57] In three cases decided on the same day, the United States Supreme Court held that although taxation of illegal activity was not unconstitutional, the requirement that the taxpayer provide incriminating information, which may be passed on to prosecutors and law enforcement, is unconstitutional under the Fifth Amendment.[58]

In *Leary v. United States*,[59] the Supreme Court struck down the Federal Marijuana Tax Act[60] because it required the individual taxpayer to provide information about the planned illegal drug transaction. The Court held that obtaining incriminating information and distributing it to prosecutors and law enforcement authorities brought the Tax Act under the Fifth Amendment protection against self-incrimination.[61]

Many state drug tax statutes have been challenged under this self-incrimination theory. Some state courts have upheld their drug tax statutes from this challenge,[62] although others have not.[63] However, many states have heeded the implicit warning of the Court's decisions[64] and developed confidentiality

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against self-incrimination, the right of equal protection, or the right of due process, but is punishment for double jeopardy purposes pursuant to the *Kurth Ranch* decision). *See* discussion *infra* Part IV.

55. *See generally* Gould, *supra* note 44; Racaniello, *supra* note 21; Iijima, *supra* note 34.

56. U.S. CONST. amend. V (the relevant portion reads "nor shall [any person] be compelled in any criminal case to be a witness against himself . . .").

57. Gould, *supra* note 44, at 542 (citing Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, 57 n.6 (1964)).

58. *See* Haynes v. United States, 390 U.S. 85 (1968); Grosso v. United States, 390 U.S. 62 (1968); Marchetti v. United States, 390 U.S. 39 (1968), *cert. granted and judgment vacated*, Picolli v. United States, 390 U.S. 202 (1968). *See also* Racaniello, *supra* note 21.

59. 395 U.S. 6 (1969).

60. 26 U.S.C. §§ 4741-4475 (1954) (repealed 1970).

61. *Leary*, 395 U.S. at 28-29.

62. *See* State v. Davis, 787 P.2d 517 (Utah Ct. App. 1990); Sisson v. Triplett, 428 N.W.2d 565 (Minn. 1988).

63. *See* State v. Roberts, 384 N.W.2d 688 (S.D. 1986); Florida Dep't of Revenue v. Herre, 634 So. 2d 618 (Fla. 1994) (overruling Harris v. State Dep't of Revenue, 563 So. 2d 97 (Fla. Dist. Ct. App. 1990)).

64. *See supra* note 58.

provisions within their statutes,[65] as well as criminal sanctions for any violations of such confidentiality.[66] Although this is only a brief introduction to this challenge, it is important to recognize that until the *Kurth Ranch* decision the self-incrimination attack had been the strongest challenge to state drug taxes, and must still be addressed in the drafting or revising of any statute.[67]

2. Due Process Challenge.—State drug taxes have also faced due process challenges, but to a much lesser degree and with little success. The portion of the Due Process Clause requiring that punishments be within the bounds established by the legislature is not implicated by drug tax statutes. The challenges in this area relate to jeopardy assessment.[68] The Court has held that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[69] The element necessary to avoid this challenge is the provision to taxpayers of an administrative hearing and judicial review prior to deprivation of their property.

3. Excessive Fines Challenge.—The excessive fines challenge has been a growing attack on state drug taxes in light of the Supreme Court's holding in *Austin v. United States*.[70] In *Austin*, the defendant pled guilty to possession of cocaine with intent to distribute and was sentenced to imprisonment. Thereafter, the United States filed an in rem action against his home and body shop pursuant to federal law.[71] The Court held that the Eighth Amendment's Excessive Fines Clause[72] applies to in rem civil forfeiture proceedings.[73] The Court referred to the history of the Excessive Fines Clause in justifying its application to civil proceedings.[74] It simply did not matter whether the action was labeled criminal or civil;[75] if the government's action had the effect of punishment, the Eighth Amendment's strictures applied.[76]

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65. IND. CODE §§ 6-7-3-8 to -9 (1993); NEB. REV. STAT. § 77-4315-1415 (1991) (providing confidentiality provision, but no punishment for violations of such provision).

66. GA. CODE ANN. § 48-15-10 (Supp. 1994); N.C. GEN. STAT. § 105-113.112 (1992) (each containing confidentiality provisions as well as a penalty for disclosure). In 1990, Idaho amended its statute, which already contained a confidentiality provision, to include a penalty for disclosure. IDAHO CODE § 63-4206(2) (Supp. 1995).

67. Much has been written on the self-incrimination challenge to state drug taxes. For more in-depth analysis, see Racaniello, *supra* note 21; Iijima, *supra* note 34; Gould, *supra* note 44.

68. *See* IND. CODE § 6-7-3-13 (1993) (example of a jeopardy assessment provision).

69. Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

70. 113 S. Ct. 2801 (1993).

71. *Id.* at 2803 (citing 21 U.S.C. §§ 881(a)(4), 881(a)(7) (1988)).

72. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed . . . .").

73. *Austin,* 113 S. Ct. at 2812.

74. *Id.* at 2804 (citing Browning-Ferris Industries v. Kelco Disposal, 492 U.S. 257 (1989)).

75. *Id.* at 2806.

76. "The notion of punishment, as we understand it, cuts across the division between civil and criminal law." *Id.* at 2805-06 (quoting United States v. Halper, 490 U.S. 435, 447-48 (1989)).

Interestingly, the *Austin* decision, combined with a similar holding in *Alexander v. United States*,[77] demonstrates the Excessive Fines Clause's potential use in preventing a disproportionate tax without barring subsequent proceedings or involving the Double Jeopardy Clause. For that reason, the argument could be made that it is the most sensible weapon to curtail a drug tax that becomes too disproportionate.

D. A History of the Double Jeopardy Clause[78]

The Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."[79] Although there is much doubt as to the historical support and application of double jeopardy protection, there does appear to be some historical basis for the concept of protecting an individual from repeated prosecution. However, this is a far cry from the distortion of the doctrine in the modern American context. Regardless of the obscurity of its origin, some form of double jeopardy protection has been in existence "in almost all systems of jurisprudence throughout history."[80] Because of the ambiguous legislative history surrounding the double jeopardy concept, it has been the courts, and not Congress, that have been the driving force in the formulation of its definition and role in the American system of justice.[81]

Over the years, the Supreme Court has inconsistently expounded its double jeopardy jurisprudence. The Court has been critical of itself in reference to its lack of definitive structure in double jeopardy decisions.[82] Justice Rehnquist noted in his dissent in *Whalen v. United States*[83] that the Double Jeopardy Clause is "one of the least understood . . . provisions of the Bill of Rights. [The] Court has done little to alleviate the confusion . . . ."[84]

At early common law, a defendant was "put in jeopardy of life and limb" when he was on trial for an offense that carried the punishment of death or

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77. 113 S. Ct. 2766 (1993) (noting forfeiture can be an excessive fine in violation of the Eighth Amendment).

78. Double Jeopardy jurisprudence is an enormous area with much comment. It is beyond the scope of this Note to describe this area of jurisprudence in detail. *See supra* note 16.

79. U.S. CONST. amend. V. Although the exact origin of the double jeopardy concept is a topic of debate, some scholars have traced the origin to as early as 355 B.C. Nelson T. Abbott, United States v. Halper: *Making Double Jeopardy Available in Civil Actions*, 6 B.Y.U. J. PUB. L. 551 (1992).

80. Burton, *supra* note 16, at 800 (quoting Marc Martin, Heath v. Alabama—*Contravention of Double Jeopardy and Full Faith and Credit Principles*, 17 LOY. U. CHI. L.J. 721, 723 (1986)).

81. Hon. Monroe G. McKay, *Double Jeopardy: Are the Pieces the Puzzle?*, 23 Washburn L.J. 1, 9-10 (1983).

82. Albernaz v. United States, 450 U.S. 333, 343 (1981) (calling the decisional law in the area "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator"). *See also supra* text accompanying note 2.

83. 445 U.S. 684 (1980).

84. *Id.* at 699 (Rehnquist, J., dissenting).

physical mutilation.[85] This had the practical effect of extending double jeopardy protections only to crimes that involved death or physical mutilation. The Court expanded this early common law view in *Ex parte Lange*.[86] In *Lange*, the Court held that the words "life and limb" should include all punishments for all felonies and misdemeanors, and jeopardy attaches after a previous conviction or a previous acquittal.[87] In *Green v. United States*,[88] the Supreme Court discussed the Double Jeopardy Clause's underlying ideas stating:

> [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[89]

Historically, the Double Jeopardy Clause shielded defendants from a second prosecution for the same offense after acquittal or after conviction. It did not protect against multiple punishments for the same offense. It was not until the American law developed that the area of multiple punishments was afforded similar footing as the other two protections.[90] The Court has also held that the guarantees of the Fifth Amendment apply to the states through the Due Process Clause of the Fourteenth Amendment.[91]

In *Helvering v. Mitchell*,[92] a fifty-year old case involving a sanction sought in a civil proceeding subsequent to a criminal acquittal, the Court held that "Congress may impose both a criminal and civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense."[93] The Court stated "[t]he question for decision is thus whether [the civil statute in question] imposes a criminal sanction. That question is one of statutory construction."[94]

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85. JOY A. SIGLER, DOUBLE JEOPARDY, *THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY* 60 (1969).

86. 85 U.S. 163 (1873).

87. *Id.* at 176-78.

88. 355 U.S. 184 (1957).

89. *Id.* at 187-88. *See* Burton, *supra* note 16, at 803.

90. North Carolina v. Pearce, 395 U.S. 711, 717 (1969). *See also* United States v. Halper, 490 U.S. 435, 440 (1989) ("This Court many times has held that the Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense."). The prohibition against multiple punishment does not mean that a legislature may not prescribe two types of penalties for the same offense. *See, e.g.*, United States v. DiFrancesco, 449 U.S. 117, 139 (1980).

91. Benton v. Maryland, 395 U.S. 784, 795 (1969).

92. 303 U.S. 391 (1938).

93. *Id.* at 399.

94. *Id. See also* One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 237 (1972).

In *Mitchell,* the Commissioner of Internal Revenue determined a taxpayer had fraudulently declared certain tax deductions. The taxpayer was acquitted in a criminal prosecution for tax evasion, and the Government brought a subsequent civil action to collect the tax deficiency plus a fifty percent penalty for fraud. The Supreme Court rejected the defendant's argument that the civil action subjected him to double jeopardy because the penalty was designed to be punishment and was therefore criminal and not civil in nature. The Court held the "remedial character of sanctions imposing additions to a tax has been made clear by this Court in passing upon similar legislation."[95] The Supreme Court emphasized that the additions to the tax were "intended by Congress as civil incidents of the assessment and collection of the income tax."[96]

In a subsequent decision, *United States ex rel. Marcus v. Hess,*[97] the Supreme Court reaffirmed its statutory construction approach in *Mitchell* by holding that only actions *intended* to authorize criminal punishment to vindicate public justice subject a defendant to jeopardy within the meaning of the Double Jeopardy Clause.[98] In *Hess*, the defendants were contractors who had been indicted for fraud against the Government and fined subsequent to a nolo contendere plea in the criminal matter. The lower court awarded a judgment against the defendants of $315,000 ($203,000 for double damages plus an additional $112,000 for fifty-six frauds at $2,000 each). The Supreme Court noted, "[t]he statutes on which this suit rests make elaborate provision both for a criminal punishment and a civil remedy,"[99] and, further, the "remedy does not lose the quality of a civil action because more than the precise amount of so-called actual damage is recovered."[100] The Court further commented that "Congress could remain fully in the common law tradition and still provide punitive damages."[101] The Court noted "the general practice in state statutes of allowing double or treble or even quadruple damages"[102] and also stated that "[i]t is . . . well accepted that for one act a person may be liable both to pay damages and to suffer a criminal penalty."[103]

In *Rex Trailer Co., Inc. v. United States,*[104] a case involving a civil sanction pursued subsequent to a criminal conviction, the Court again relied on the *Mitchell* statutory analysis. *Rex Trailer* involved the fraudulent purchase of five vehicles under the Surplus Property Act of 1944, which gave veterans a priority for the

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95. *Mitchell*, 303 U.S. at 401. The remedy provided by the statute "protect[ed] . . . the revenue and reimburse[d] the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud."

96. *Id.* at 405.

97. 317 U.S. 537 (1943), *reh'g denied*, 318 U.S. 799 (1943).

98. *Id.* at 548-49.

99. *Id.* at 549.

100. *Id.* at 550.

101. *Id.*

102. *Id.* at 550-51 (citing Missouri Pacific Ry. Co. v. Humes, 115 U.S. 512, 523 (1885)).

103. *Id.* at 549.

104. 350 U.S. 148 (1956).

purchase of certain surplus property.[105] The defendants had already been fined $25,000 in the criminal case when the government brought a subsequent civil action under the same Act seeking $2,000 for each fraud plus double damages and costs. The Supreme Court upheld this as a civil penalty even though "the record [did] not show petitioner's gain from the fraud"[106] and the government failed to allege specific damages for recovery.[107] The Court held "there is no requirement, statutory or judicial, that specific damages be shown, and this was recognized by the Court in *Marcus*."[108]

In what appeared to be a departure from the *Mitchell* analysis, the Court created in *United States v. One Assortment of 89 Firearms*[109] a possible sharpening stone for its future "double jeopardy dagger" by deviating from its past formalistic statutory approach. The Supreme Court determined that it should look not only to whether Congress had expressly or impliedly indicated the sanction to be criminal or civil, but to whether the sanction was so punitive in purpose or effect to make it criminal, notwithstanding the civil label. However, the Court in limiting this application noted that "'only the clearest proof'" could suffice to establish the unconstitutionality of a statute on such a ground.[110] This severe limitation and strong deference to legislative purpose, along with *Mitchell* and its progeny, would still seem to protect civil sanctions from being held so punitive as to violate the Double Jeopardy Clause.

The Court, through this development of cases starting over fifty years ago, appeared to establish, as a general rule, that civil sanctions would not be held to violate the Double Jeopardy Clause without a finding that the statute itself was criminal in purpose or effect, requiring the tremendous burden of "only the clearest proof."[111] Further, this development of cases recognized that even recovery in excess of actual damages did not cause a civil action to lose its remedial nature and that civil sanctions with deterrent components[112] did not punish for purposes of a double jeopardy analysis.

Then, the Supreme Court, with a vengeance never shown before, bared its double jeopardy dagger, slashed at fifty years of precedent, and pivoting upon the *Halper* decision,[113] brought civil proceedings clearly under the double jeopardy umbrella of protection.[114] Having further sharpened its weapon with *Halper*, and

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105. *Id.* at 148 (citing Surplus Property Act of 1944, ch. 479, § 1, 58 Stat. 765 and § 26, 58 Stat. 780 (1944), § 26 codified 50 U.S.C. app. § 1635 (1946), repealed July 1, 1949).

106. *Id.* at 150.

107. *Id.* at 152.

108. *Id.* at 152-53.

109. 465 U.S. 354 (1984).

110. *Id.* at 365 (quoting United States v. Ward, 448 U.S. 242, 249 (1980)). *See also* One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 237 (1972); Flemming v. Nestor, 363 U.S. 603, 617 (1960); *Rex Trailer Co., Inc.*, 350 U.S. at 154.

111. *See supra* note 110 and accompanying text.

112. Such as liquidated, double, treble, or quadruple damages.

113. United States v. Halper, 490 U.S. 435 (1989).

114. This is especially ironic given the Court's dual sovereignty doctrine. *See* Bartkus v.

impervious to the future carnage that its holding could cause, the Court proceeded on to *Kurth Ranch*,[115] confident it could draw fresh double jeopardy blood.[116]

II. THE KURTH RANCH DECISION ("THE ATTACK")

A. Factual and Procedural Background (Events Leading up to the "Attack")

The Kurth family[117] for years had operated a mixed grain and livestock farm in Montana.[118] In 1986, they began to cultivate and sell marijuana. In the latter part of 1987, shortly after the effective date of the Dangerous Drug Tax Act,[119] Montana law enforcement officers raided the farm, arrested the Kurths, and confiscated the marijuana plants, materials, and paraphernalia. The State filed criminal charges against all six family members in a Montana district court, charging each with conspiracy to possess drugs with intent to sell,[120] or in the alternative, possession of drugs with intent to sell.[121] After initially pleading not guilty, the Kurths eventually pled guilty to possession of illegal drugs with intent to sell or conspiracy to possess illegal drugs with intent to sell.[122] In a second proceeding, the Kurths settled a state forfeiture action by agreeing to forfeit $18,016.83 in cash and various items of equipment. The Department of Revenue of Montana, in a third proceeding, attempted to collect approximately $900,000 in taxes, interest, and penalties based on the statute assessing taxes on dangerous drugs, the various plants, harvested marijuana, hash tar, and hash oil. After contesting the assessments, the Kurths petitioned for Chapter 11 bankruptcy protection.[123]

In bankruptcy court, the Kurths challenged the constitutionality of the

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Illinois, 359 U.S. 121 (1959) (allowing state criminal prosecution subsequent to federal trial and acquittal based on same acts); Abbate v. United States, 359 U.S. 187 (1959) (allowing subsequent federal criminal prosecution after state prosecution and conviction based on same acts). *See generally* Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. REV. L. & SOC. CHANGE 383 (1986); Michael A. Dawson, Note, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281 (1992).

115. Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 1937 (1994).

116. The *Halper* decision, although not used as a direct holding, is vital to the Supreme Court's *Kurth Ranch* analysis. The *Halper* case will be discussed in greater detail in Part II.B. *See infra* notes 143-156 and accompanying text.

117. The Kurth family consisted of Richard Kurth; his wife, Judith Kurth; their son, Douglas Kurth; their daughter, Cindy Halley; Douglas' wife, Rhonda Kurth; and Cindy's husband, Clayton Halley. *Kurth Ranch*, 114 S. Ct. at 1942 n.6.

118. *Id.* at 1955-56 (the factual context is taken from the *Kurth Ranch* opinion).

119. MONT. CODE ANN. §§ 15-25-101 to -123 (1987) (revised 1993).

120. *Id.* § 45-4-102 (1987).

121. *Id.* § 45-9-103.

122. Only Richard Kurth was adjudged guilty of possession, the other five pled guilty to a conspiracy charge.

123. *In re* Kurth Ranch, 145 B.R. 61 (Bankr. D. Mont. 1990).

Montana tax. After reducing the amount of the assessment authorized by the Act to $181,000, the bankruptcy court still held the assessment invalid under the Federal Constitution. The bankruptcy court relied primarily on *Halper* in concluding the assessment, because of its retributive nature, constituted a form of double jeopardy.[124] The district court affirmed.[125] The court concluded that the Montana Dangerous Drug Tax "simply punishes the Kurths a second time for the same criminal conduct."[126] The Ninth Circuit Court of Appeals also affirmed,[127] but based its conclusion largely on the State's refusal to offer evidence justifying the tax, not because the tax was unconstitutional on its face.[128] The court held that under *Halper*, a disproportionately large civil penalty can be punishment for double jeopardy purposes.[129]

While the Kurth's case was on appeal, the Montana Supreme Court reversed two lower court decisions that held the Dangerous Drug Tax to be a form of double jeopardy.[130] Because the Montana Supreme Court decision stood in conflict with the Court of Appeals decision, the United States Supreme Court granted certiorari.[131]

It is at this point that the Supreme Court used its double jeopardy dagger to attack a community supported victim and it did so with an instrument inappropriate for the task at hand.[132]

B. The Supreme Court's Attack ("Scene of the Attack")

In holding Montana's Drug Tax in violation of the Double Jeopardy Clause, the Supreme Court made some less than graceful strides around and over prior cases. The Court also compelled the strained support of prior cases in reaching its conclusions. In part, this prompted four Justices to register their dissent in three separate opinions. This portion of the Note will first point to the problem areas of the majority opinion as well as the possible "bandages" the opinion left behind to help heal the wounds of its attack.[133]

1. Double Jeopardy Interpretation (An "Element of the Attack").—The majority in *Kurth Ranch* was comfortable in continuing the questionable

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124. Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 1937, 1943 (1994).

125. *In re* Kurth Ranch, No. CV-90-084-GF, 1991 WL 365065 (D. Mont. Apr. 23, 1991).

126. *Id.*

127. *In re* Kurth Ranch, 986 F.2d 1308 (9th Cir. 1993).

128. *Id.* at 1312.

129. *Id.*

130. Sorensen v. State Dep't of Revenue, 836 P.2d 29 (Mont. 1992).

131. Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 1937, 1944 (1994).

132. Other weapons in the Court's arsenal arguably would have been better suited for this attack. *See supra* Part I.C.3. *See also infra* Part IV.

133. *Kurth Ranch*, 114 S. Ct. at 1949 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist notes in his dissent that "the Court goes astray and the end result of its decision is a hodgepodge of criteria—many of which have been squarely rejected by our previous decisions—to be used in deciding whether a tax statute qualifies as 'punishment.'" *Id.*

interpretation of *Ex parte Lange*[134] that has possibly been reinforced in too many cases[135] to be overcome at this point. In *Ex parte Lange,* at the trial level, a jury found Edward Lange guilty of appropriating mail-bags to his own use and the court sentenced him to both one year imprisonment and a $200 fine although the statute authorized a maximum sentence of only one year imprisonment or a fine not to exceed $200, but not both. Justice Scalia, in his dissenting opinion in *Kurth Ranch*, properly pointed out that Justice Miller's opinion in *Ex parte Lange* purposefully avoided relying exclusively on the Double Jeopardy Clause.[136] Scalia further stated that the Due Process Clause alone could support the decision because the penalty imposed exceeded legislative authorization.[137] Scalia's dissent, while noting that the Double Jeopardy Clause has since been applied with frequency to both successive prosecutions and punishment,[138] emphasized that "the repetition of a dictum does not turn it into a holding, and an examination of the cases discussing the prohibition against multiple punishments demonstrates that, until *Halper*, the Court never invalidated a *legislatively authorized* successive punishment."[139]

The Court commented in *Whalen v. United States*[140] that no double jeopardy problem would have been presented in *Ex parte Lange* if Congress had provided that the offense was punishable by both a fine and imprisonment, even though that is multiple punishment.[141]

Although this Note does not explore in-depth whether the issue of multiple punishments, in the context of the *Kurth Ranch* decision, has been properly brought into the breadth of the Double Jeopardy Clause, to assume it as a foregone conclusion would be ignoring the very abuse that allowed the Court to proceed

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134. 85 U.S. 163 (1873).

135. *See* North Carolina v. Pearce, 395 U.S. 711 (1969) (stating that although the text of the Double Jeopardy Clause only mentions harm to life or limb, it is well settled that the Amendment covers imprisonment and monetary penalties).

136. *Kurth Ranch*, 114 S. Ct. at 1955-56 (Scalia, J., dissenting).

> The opinion went out of its way *not* to rely on the Double Jeopardy Clause, in order to avoid deciding whether it applied to prosecutions not literally involving "life or limb." It is clear that the Due Process Clause alone suffices to support the decision, since the guarantee of the process provided by the law of the land assures prior legislative authorization for whatever punishment is imposed.

Id. at 1956 (quoting Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 28-29 (1991) (Scalia, J., concurring in judgment) (citations omitted).

137. *Id.*

138. *Id.* "Between *Lange* and our decision five Terms ago in *United States v. Halper*, our cases often stated that the Double Jeopardy Clause protects against both successive prosecutions and successive punishments for the same criminal offense." *Id.* (citing North Carolina v. Pearce, 395 U.S. 711, 717 (1969); Illinois v. Vitale, 447 U.S. 410, 415 (1980); Ohio v. Johnson, 467 U.S. 493, 498-99 (1984)) (citations omitted).

139. *Id.*

140. 445 U.S. 684 (1980).

141. *Id.* at 688.

with its double jeopardy attack in the first place.[142]

2. *Classifying a Tax as Punishment (An "Element of the Attack").*—The Supreme Court, in holding Montana's Drug Tax to be punishment for double jeopardy analysis, has met another disturbing element of the crime. Although the majority and dissenting opinions agree that the *Halper* mode of analysis does not directly apply to taxes in the *Kurth Ranch* decision,[143] on its face, this holding appears somewhat of a rational jump from the Court's holding in *Halper.*[144] However, the *Halper* decision was instrumental in pushing the Court to the brink of double jeopardy, insanity and in part, it gave the Court the motive it needed for the attack on Montana's state drug tax.

In *United States v. Halper,* the Supreme Court for the first time held that a disproportionately large civil penalty can be punishment for double jeopardy purposes.[145] Halper was convicted of sixty-five separate violations of the Criminal False Claims Statute,[146] each involving a demand for $12 in reimbursement for medical services worth only $3.[147] After Halper's sentencing on the criminal matter, the government took action in a separate proceeding to recover a $2,000 civil penalty for each of the sixty-five violations. The district court held that the total recovery sought of $130,000 failed to bear a rational relationship to the government's minimal loss of $585, even including the cost of investigation and prosecution.[148] The court concluded that the civil penalty, which was over 220 times greater than the government's measurable loss, was punitive and was therefore barred by the Double Jeopardy Clause.

The Supreme Court, accepting the district court's findings, held that "under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution."[149] The Court, however, limited its decision by noting that "[w]e cast no shadow on these time-honored judgements. . . . [W]hat we announce now is a rule for the rare case."[150]

Halper is important to the *Kurth Ranch* decision in that the Supreme Court

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142. For a more in-depth analysis of multiple punishments being included in the scope of the Double Jeopardy Clause, see *supra* note 16.

143. *Kurth Ranch*, 114 S. Ct. at 1948. The majority notes that "as The Chief Justice points out, tax statutes serve a purpose quite different from civil penalties, and *Halper's* method of determining whether the exaction was remedial or punitive simply does not work in the case of a tax statute." *Id.* Subjecting Montana's drug tax to *Halper's* test for civil penalties is therefore inappropriate. *Id.* Only Justice O'Connor in her dissenting opinion determined the *Halper* method of analysis should be applied. *Id.* at 1955 (O'Connor, J., dissenting).

144. United States v. Halper, 490 U.S. 435 (1989).

145. *Id.* at 452.

146. *Id.* at 437 (citing 18 U.S.C. § 287 (1988)).

147. *Id.* at 437-40.

148. *Id.* at 438-39.

149. *Id.* at 448-49.

150. *Id.* at 449.

used *Halper* as a justification for its double jeopardy madness. By attempting to explain the *Halper* decision as the "rare case,"[151] the Court dodged many of its earlier decisions regarding civil and criminal proceedings.[152] The Court also acknowledged that the holding applied to cases "such as the one before us, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused."[153] The opinion added that when

> the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment.[154]

The Court muddied the double jeopardy waters even further, and acknowledged it was doing so,[155] by leaving to the trial courts the arduous task of determining when civil penalties have crossed the imaginary line into punishment.[156]

Armed with the *Halper* decision, the majority in *Kurth Ranch*, although acknowledging that *Halper* did not consider whether a tax may similarly be characterized as punitive,[157] attacked Montana's drug tax by analogy. The Court conceded that while "fines, penalties, and forfeitures are readily characterized as sanctions, taxes are typically different because they are *usually* motivated by revenue-raising rather than punitive purposes."[158] The majority also noted that the Court has previously "cautioned against invalidating a tax simply because its enforcement might be oppressive or because the legislature's motive was somehow suspect."[159] Immediately thereafter, the Court attacked the weight of precedent

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151. *Id.*

152. *Id.* at 441-46. The Court makes strained efforts to distinguish earlier holdings in several cases including United States v. Ward, 448 U.S. 242 (1980); Rex Trailer Co. v. United States, 350 U.S. 148 (1956); United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943); Helvering v. Mitchell, 303 U.S. 391 (1938).

153. *Halper*, 490 U.S. at 441-46.

154. *Id.* at 449-50.

155. *Id.* Specifically the Court stated that "[w]e acknowledge that this inquiry will not be an exact pursuit. In our decided cases we have noted that the precise amount of the Government's damages and costs may prove to be difficult, if not impossible, to ascertain." *See, e.g., Rex Trailer Co.*, 350 U.S. at 153 (The process of determining the government's compensation and costs "involves an element of rough justice.").

156. *Halper*, 490 U.S. at 450 ("We must leave to the trial court the discretion to determine on the basis of such an accounting the size of the civil sanction the Government may receive without crossing the line between remedy and punishment.").

157. Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 1937, 1945 (1994).

158. *Id.* at 1946 (emphasis added).

159. *Id.* at 1946 (citing A. Magnano Co. v. Hamilton, 292 U.S. 40, 44 (1934)).

with the *Child Labor Tax Case*.[160] The Court explained that the *Child Labor Tax Case* supports the proposition that at some point a tax loses its character as such and becomes a penalty.[161] However, the *Child Labor Tax Case* dealt with the federal government's attempt to regulate the employment of child labor through a tax, a matter reserved to the states under the Tenth Amendment;[162] and thus the federal action was an invalid exercise of the taxing power conferred by the Constitution.[163] Notwithstanding the majority's own acknowledgments, it attacked the state drug tax despite appeals to precedent by the minority opinions.

Chief Justice Rehnquist, in his dissenting opinion, tried to dull the double jeopardy blade; however, his efforts seemed only to make the majority swing that much harder. The Chief Justice agreed with the majority that *Halper* begged the question of whether the Montana Drug Tax constitutes a second punishment—for double jeopardy purposes—for conduct already punished criminally.[164] However, this is where his agreement with the majority ends. He noted that "the Court then goes astray and the end result of its decision is a hodgepodge of criteria—many of which have been squarely rejected by our previous decisions—to be used in deciding whether a tax statute qualifies as 'punishment.'"[165] Rehnquist argued that the manner in which taxes have been viewed in prior cases is an area too compelling to be overlooked.[166] In examining the *Halper* decision, he noted that "compensation for the Government's loss is the avowed purpose of a civil penalty statute."[167] In contrasting this purpose with that of tax statutes, he noted that "here we are confronted with a tax statute, and the purpose of a tax statute is not to recover the costs incurred by the Government for bringing someone to book for some violation of law, but is instead to either raise revenue, deter conduct, or both."[168] He emphasized that "[t]ax statutes need not be based on any benefit accorded to the taxpayer or on any damage or cost incurred by the Government as a result of the taxpayer's activities."[169]

The Supreme Court had previously turned aside Constitutional attacks on taxes that could be enacted to deter or even suppress the taxed activity.[170] In

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160. 259 U.S. 20, 38 (1922).

161. *Kurth Ranch,* 114 S. Ct. at 1946.

162. U.S. CONST. amend. X.

163. 259 U.S. at 36-44.

164. *Kurth Ranch*, 114 S. Ct. at 1950 (Rehnquist, C.J., dissenting).

165. *Id.* at 1949.

166. *Id.* at 1950.

167. *Id.* at 1949.

168. *Id.* (citing Welch v. Henry, 305 U.S. 134, 146 (1938); Sonzinsky v. United States, 300 U.S. 506, 513 (1937)).

169. *Id.* at 1950 (citing Commonwealth Edison Co. v. Montana, 453 U.S. 609, 622 (1981)).

170. *See* Sonzinsky v. United States, 300 U.S. 506, 513 (1937) (The Court stated, "it has long been established that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed."); A. Magnano Co. v. Hamilton, 292 U.S. 40 (1934) (Court upheld state tax despite due process challenge to a steep excise tax imposed by the State of Washington on processors of

United States v. Sanchez,[171] the Court used strong language in upholding the former federal tax on marijuana of $100 per ounce against a challenge that the tax was a penalty rather than a true tax, stating, "*[i]t is beyond serious question* that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activity taxed."[172]

Finally, Chief Justice Rehnquist summed up his view of the Majority's passive acknowledgment of prior cases to reach its opinion attacking Montana's drug tax by commenting that "[t]he Court's opinion today gives a passing nod to these cases, but proceeds to hold that a high tax rate and a deterrent purpose 'lend support to the characterization of the drug tax as punishment.'"[173]

Justice O'Connor, in her dissent, attempted to apply the *Halper* analysis to the tax statute. In order for the tax to violate the Double Jeopardy Clause, she explained that the tax must serve only the purposes of retribution and deterrence, as opposed to having any non-punitive objective, and further that the amount of the sanction would need to be overwhelmingly disproportionate to the damages or costs suffered by the Government.[174] Throughout her opinion, she provided data from several sources that support the huge monetary cost incurred by both state and federal governments to control drug related activities, incarceration, education, and treatment.[175] Although Justice O'Connor was the only Justice who attempted to apply the *Halper* analysis, her dissent raises other interesting concerns for the future impact of the Court's holding. She noted that the "State of Montana—along with about half of the other States—is now precluded from ever imposing the drug tax on a person who has been punished for a possessory drug offense,"[176] and expressed grave concern for the Court's almost afterthought that the proceeding initiated by Montana to collect the tax on the possession of drugs was the "functional equivalent of a successive criminal prosecution."[177]

III. POSSIBLE RAMIFICATIONS OF *KURTH RANCH* ("AFTER THE ATTACK")

Several questions remain after the Supreme Court's attack in *Kurth Ranch,* most importantly whether state drug taxes can survive, and if so, to what extent have they been limited. After *Kurth Ranch*, many states reacted by applying the Court's decision to their own state drug taxes. Some states found that their state drug tax statutes violate double jeopardy protections[178] depending on how they are

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oleomargarine.).

171. 340 U.S. 42 (1950).

172. *Id.* at 44 (emphasis added).

173. *Kurth Ranch*, 114 S. Ct. at 1950 (Rehnquist, C.J., dissenting) (citing majority opinion).

174. *Id.* at 1953 (O'Connor, J., dissenting).

175. *Id.* at 1953-54.

176. *Id.* at 1955.

177. *Id.* (Justice O'Connor was joined in this concern by Justices Scalia and Thomas). *See also id.* 1959-60 (Scalia, J., dissenting).

178. *See, e.g.,* Covelli v. Crystal, No. 534178, 1994 WL 722976 (Conn. Super. Tax 1994), *rev'd sub nom.* Covelli v. Commissioner of Revenue Servs., 1995 WL 747855 (Conn. 1995); Clifft

applied.[179] Still others have found that their drug tax statutes do not violate double jeopardy for various reasons, including whether their statutes share the "unusual features" the Court noted when declaring Montana's statute unconstitutional.[180]

Additionally, federal jurisdictions take different approaches, primarily in the area of forfeitures, to how the *Kurth Ranch* decision should be applied.[181] Based on these differences, one can only hope that the Supreme Court will see the error of its ways and use future decisions to help clarify the situation.

Indirectly, other questions arise, including: 1) what impact will *Kurth Ranch* have when the preceding case is civil and the subsequent case is criminal? (will this bar the criminal prosecution?);[182] 2) what impact will the decision have on the taxation of illegal activities overall?; 3) what other constitutional protection(s) will this decision impose upon tax proceedings?; and 4) what other areas will be affected by this "double jeopardy stretching"?[183]

As expected, several criminal defendants have used the trilogy of cases ending with *Kurth Ranch* to attack civil or administrative proceedings in hopes of pulling them under the expanded double jeopardy umbrella. This is especially prevalent in cases involving driving while intoxicated, wherein the defendants attempt to bar

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v. Indiana Dep't of State Revenue, 641 N.E.2d 682 (Ind. Tax 1994), *aff'd in part*, 660 N.E.2d 310 (Ind. 1995).

179. *Compare Clifft*, 641 N.E.2d at 682, *aff'd in part and rev'd in part*, 660 N.E.2d 310 (Ind. 1995), (holding Indiana's CSET to violate double jeopardy) *with* Whitt v. State, 645 N.E.2d 677 (Ind. Ct. App. 1995), *aff'd*, 659 N.E.2d 512 (Ind. 1995) (holding defendant's prosecution for failure to pay Indiana's CSET was contemporaneous with prosecution for underlying drug offense and did not violate double jeopardy clause).

180. *See, e.g.*, State v. Lange, 531 N.W.2d 108 (Iowa 1995) (punishment of defendant did not constitute double jeopardy when defendant had already been punished by assessment of tax following arrest); State v. Gulledge, 896 P.2d 378 (Kan. 1995) (payment of amounts allegedly owed under Kansas Drug Tax Act did not constitute criminal punishment for double jeopardy purposes); State v. Morgan, 455 S.E.2d 490 (N.C. Ct. App. 1995) (sentences for trafficking in cocaine and for failure to pay excise tax did not violate double jeopardy).

181. *See* United States v. One Parcel of Real Property Located at No. 14-I, 899 F. Supp. 1415 (D.V.I. 1995) (indicating the court was aware of the contrary conclusions reached by courts of appeals in other circuits on the double jeopardy issue as it applies to forfeiture). *See generally* Gary M. Maveal, *Criminalizing Civil Forfeitures,* 74 MICH. B.J. 658 (1995).

182. The Court recognizes this as a future issue. "This statute . . . does not raise the question whether an ostensibly civil proceeding that is designed to inflict punishment may bar a subsequent proceeding that is admittedly criminal in character." Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 1937, 1947 n.21 (1994). The Indiana Supreme Court recently answered this question in the affirmative in Bryant v. State, 660 N.E.2d 290 (Ind. 1995) (holding that jeopardy first attached when the Indiana Department of State Revenue served Bryant with a Record of Jeopardy Findings and Jeopardy Assessment Notice & Demand, thus barring future criminal prosecution).

183. *Kurth Ranch* was even used to argue against the registration of convicted sex offenders as required by the state. Doe v. Poritz, 662 A.2d 367 (N.J. 1995).

criminal prosecution based on prior administrative license suspensions.[184] These challenges meet with varying degrees of success.[185] Additionally, courts handle a number of appeals that use *Kurth Ranch* to bolster their argument to declare forfeitures unconstitutional on double jeopardy grounds.[186]

Finally, there is a concern that this type of policy statement sends the wrong message to those involved in the drug trade. This message is especially meaningful to members of the drug trade too far removed to incur, with any frequency, the sting of criminal punishment, yet consistently able to enjoy the illegal gains that state drug taxes are meant to impact.

A. The Survival of State Drug Taxes ("Severity of the Wounds")

The Supreme Court, despite its vicious attack on state drug taxes, left behind a few "bandages" with which to patch the wounds, leaving the possibility that the drug taxes have not incurred a fatal blow.[187] Noting that unlawfulness of an activity does not prevent its taxation,[188] the Court in *Kurth Ranch* used strong language in asserting that Montana could have collected its tax if it had not previously punished the taxpayer for the same offense, or had assessed the tax in the same proceeding.[189] The possibility of imposing the tax in the criminal prosecution appears to be one avenue, however impractical, a state may use to pursue its drug tax. Allowing for the tax and then forcing it into the same proceeding as a criminal prosecution emphasizes the difficulty of applying the Double Jeopardy Clause to state drug taxes. Burdens of proof are different,[190] required elements of each case are different, and the administrative problems concerning which departments and personnel are best qualified to handle the case make this option practically impossible.

The Court also emphasized, in *Kurth Ranch*, specific or "unusual features,"[191]

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184. *See* Daniel T. Gilbert & John A. Stephen, *Is Suspension of Drivers' Licenses in Jeopardy?*, PROSECUTOR, June 29, 1995, at 24.

185. *See, e.g.*, Davidson v. MacKinnon, 656 So. 2d 223 (Fla. Dist. Ct. App. 1995), *review denied*, 663 So. 2d 931 (Fla. 1995) (administrative suspension of driver's license for DUI does not bar subsequent criminal prosecution); Florida v. Reilly, No. 94-6661MM10 (Broward County Ct. Fla. Dec. 22, 1994) (suspension of license constitutes punishment for double jeopardy purposes). *See also* Richard C. Reuben, *Double Jeopardy Claims Gaining: Issue is raised with Some Success in Civil-Forfeiture, Drunk-Driving Cases*, A.B.A. J., June 1995, at 16.

186. *See generally* Maveal, *supra* note 181.

187. *See* discussion *infra* Part IV.

188. *See supra* notes 24-27 and accompanying text.

189. Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 1937, 1946 (1994) (citing Missouri v. Hunter, 459 U.S. 359, 368-69 (1989)).

190. This is assuming that the Court's recognition of the tax as a "functional equivalent of a successive criminal prosecution" does not open the floodgates for more constitutional protections such as the requirement of proof beyond a reasonable doubt in criminal matters. *Id.* at 1955.

191. *Id.* at 1947.

which if avoided by a state in formulating its statute[192] may prevent the Supreme Court from subjecting that statute to scrutiny under double jeopardy analysis.

1. High Rate of Taxation and Deterrent Purpose.—The Court explained that "neither a high rate of taxation nor an obvious deterrent purpose automatically marks this tax as a form of punishment,"[193] but then continued by stating that these were consistent with a punitive character. The Court determined the tax rate was eight times the market or "street" value on a particular portion of the drugs,[194] and that ultimately the state taxed the drugs at about 400% of their overall market value.

2. Tax Collected After Fines and/or Forfeiture.—The Montana Drug Tax expressly provided that the tax was to be collected only after state or federal fines or forfeitures had been satisfied. To avoid this seemingly harmless fallacy in the statute it could simply be omitted from any draft or revision.

3. Taxed on Goods Neither Owned or Possessed.—The Court argued that the tax was levied on goods the taxpayer neither owned nor possessed at the time of taxation. This argument fails to take into consideration the practicality of taxing illegal goods. Although the tax alludes to storage or possession, it is clear the purpose of the Act was to tax the drug. Further, Chief Justice Rehnquist pointed out the absurdity of the Court choosing form over substance, stating "[s]urely the Court is not suggesting that the State must permit the Kurths to keep the contraband in order to tax its possession."[195]

4. Only Taxpayers Arrested had Obligation to Pay.—The Act authorized the Department of Revenue to adopt rules to administer and enforce the drug tax. Under those rules, the taxpayer must file a return within seventy-two hours of arrest. The rules provided for law enforcement to complete a Dangerous Drug Act report and give taxpayers an opportunity to sign it.[196] The Court interpreted this to mean that the taxpayer had no obligation to file a return or to pay any tax unless and until he or she is arrested, meaning that persons arrested for marijuana constituted the entire class of taxpayers subject to Montana's tax.[197] Chief Justice Rehnquist in his dissent disputes this conclusion, noting this only "acknowledges the practical realities involved in taxing an illegal activity."[198]

5. *Preamble Alluded to Burden for Law Violators.*—The Supreme Court found a further punitive feature in the preamble of Montana's Drug Tax Act by reasoning that without question the intent of Montana's legislature was to deter people from possessing marijuana.[199] Despite the Court's conclusion that the

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192. *See* discussion *infra* Part IV (proposing provisions of a model statute which would avoid these features).

193. *Kurth Ranch*, 114 S. Ct. at 1946.

194. *Id.* at 1943 n.12 (The lower valued portion of the drug is "shake" which refers to the stems, leaves, and other parts with lower levels of tetrahydrocannabinol (THC).).

195. *Id.* at 1951 (Rehnquist, C.J., dissenting).

196. *Id.* at 1941-42.

197. *Id.* at 1942 (citing MONT. ADMIN. R. 42.34.103(3) (1988)).

198. *Id.* at 1950 (Rehnquist, J., dissenting).

199. *Id.* at 1946 (quoting 1987 Mont. Laws, ch.563, p. 1416). *See also id.* at 1951 n.3

preamble "evinces a clear motivation to raise revenue," it also indicated that the tax "provide[d] for anticrime initiatives by 'burdening' violators of the law instead of 'law abiding taxpayers.'"[200]

In order for a state drug tax statute to survive the *Kurth Ranch* attack, these features must be addressed in the initial drafting or revising of state drug tax legislation. Part IV of this Note addresses these concerns in proposing certain provisions of a model statute.

As mentioned previously, courts have already reacted to the *Kurth Ranch* decision. Much to the delight of drug offenders, some courts have held their state drug taxes to be unconstitutional based on the *Kurth Ranch* holding.[201] The Supreme Court itself has remanded cases for further consideration in light of *Kurth Ranch*.[202] Still other cases concerning forfeiture, civil penalty, and tax proceeding, are working their way through the Supreme Court maze.[203] Worse yet, the fear of previous civil actions barring subsequent criminal proceedings has come to light.[204]

B. Indirect Ramifications of Kurth Ranch

Several questions could arise regarding the *Kurth Ranch* decision's indirect impact on other areas of the law.[205] As alluded to by the Court, the question of whether a subsequent criminal case would be barred by a preceding civil case is left unanswered. The disturbing statement that the tax collection proceeding was a "functional equivalent of a successive criminal prosecution"[206] possibly encourages a criminal drug defendant to proceed with payment of the tax in hopes of utilizing a double jeopardy argument to thwart his prosecution.

Through numerous decisions of the Supreme Court, the taxation of illegal activities has been upheld.[207] In *Kurth Ranch*, with one swoop of the pen, the Court seemingly erased solid precedent. Although only time will tell, the future

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(provides the preamble in text, citing MONT. CODE ANN. § 15-25-122 (1993) (preamble)).

200. *Id.* at 1946 n.18.

201. Covelli v. Crystal, No. 534178, 1994 WL 722976 (Conn. Super. Tax, Dec. 21, 1994), *rev'd*, Covelli v. Commissioner of Revenue Servs., No. 15198, 1995 WL 747855 (Conn. Dec. 19, 1995); Bryant v. State, 660 N.E.2d 290 (Ind. 1995); Clifft v. Indiana Dep't of State Revenue, 641 N.E.2d 682 (Ind. Tax 1994), *aff'd in part, rev'd in part*, 660 N.E.2d 310 (Ind. 1995); Hall v. Indiana Dep't of State Revenue, 641 N.E.2d 694 (Ind. Tax 1994), *aff'd in part, rev'd in part*, 660 N.E.2d 319 (Ind. 1995); Bailey v. Indiana Dep't of State Revenue, 641 N.E.2d 695 (Ind. Tax 1994), *rev'd*, 660 N.E.2d 322 (Ind. 1995).

202. Ward v. Texas, 115 S. Ct. 567 (1994) (mem.); Stennett v. Texas, 115 S. Ct. 307 (1994) (mem.).

203. United States v. Haywood, 864 F. Supp. 502 (W.D.N.C. 1994).

204. Fant v. State, 881 S.W.2d 830 (Tex. Ct. App. 1994).

205. *See infra* Part III.

206. Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 1937, 1948 (1994).

207. See *supra* Part I.A. for a discussion of the history behind taxation of illegal activity in general.

taxation of illegal activities will probably follow a similar path as state drug taxes. This Note argues that only the craftiest of legislatures can outwit the Court's cunning decision on the taxation of illegal activities. The areas the Supreme Court considered problematic with respect to the Montana Drug Tax must be scrutinized when drafting any tax legislation, unless the legislation also falls on the honest, law abiding tax payer.

Kurth Ranch has made the time ripe for introducing additional protections into tax proceedings. An argument could be made that the safeguards the Court gave in *Kurth Ranch* will lead to the same problems that accompanied the *Halper* decision. Nonetheless, the true blow the Supreme Court struck is against the allies of the victim—programs for drug education and treatment, law enforcement efforts, and the morale of the country to name a few. Understandably, all legislation must have limits, but surely those limits do not include allowing an industry to inflict numerous economic and social costs upon a state and walk away without even paying for the damage caused. This is especially disturbing given the enormous economic fruits the drug industry is enjoying.

IV. MODEL STATUTE PROVISIONS FOR STATE DRUG TAXES ("BANDAGING THE WOUNDS")

Due to constitutional attacks, specifically the double jeopardy attack set forth in *Kurth Ranch*, careful construction of state drug tax statutes will determine whether they survive judicial scrutiny. Most state drug tax statutes, regardless of the taxation scheme, have several provisions. Various aspects of the statutes, such as those dealing with the definition of statute terminology or technical aspects of administration,[208] have not prompted the constitutional attacks. There are, however, those sections that have been the turning point on which some statutes have been upheld and others have fallen prey. The primary concern of this Part of the Note is to provide a model for those provisions that have the potential to immunize drug taxes against a double jeopardy attack.[209] To a lesser degree,

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208. An example of such an aspect would be how the drug stamps will be printed.

209. This Note does not attempt to analyze the constitutionality of Indiana's CSET based on the Indiana Constitution. For more in this area, see F. Anthony Paganelli, *Constitutional Analysis of Indiana's Controlled Substance Excise Tax,* 70 IND. L.J. 1301 (1995). For purposes of drafting some model provisions, this Note will use, in part, Indiana's Controlled Substance Excise Tax (CSET) at IND. CODE §§ 6-7-3-1 to -17 (1993). Following is the text of the code in its current form:

6-7-3-1 "Controlled substance" defined

Sec. 1. As used in this chapter, "controlled substance" has the meaning set forth in IC 35-48-1-9.

6-7-3-2 "Delivery" defined

Sec. 2. As used in this chapter, "delivery" has the meaning set forth in IC 35-48-1-11.

6-7-3-3 "Department" defined

Sec. 3. As used in this chapter, "department" refers to the department of state revenue.

6-7-3-4 "Manufacture" defined
Sec. 4. As used in this chapter, "manufacture" has the meaning set forth in IC 35-48-1-18.

6-7-3-5 Imposition of tax
Sec. 5. The controlled substance excise tax is imposed on controlled substances that are:
(1) delivered;
(2) possessed; or
(3) manufactured;
in Indiana in violation of IC 35-48-4 or 21 U.S.C. 841 through 21 U.S.C. 852. The tax does not apply to a controlled substance that is distributed, manufactured, or dispensed by a person registered under IC 35-48-3.

6-7-3-6 Determination of amount of tax; weight of substance
Sec. 6. (a) The amount of the controlled substance excise tax is determined by the weight of the controlled substance as follows:
(1) On each gram of a schedule I, II, or III controlled substance, forty dollars ($40) for each gram and a proportionate amount for each fraction of a gram.
(2) On each gram of a schedule IV controlled substance, twenty dollars ($20) for each gram and a proportionate amount for each fraction of a gram.
(3) On each gram of a schedule V controlled substance, ten dollars ($10) for each gram and a proportionate amount for each fraction of a gram.
(b) A gram of a controlled substance is measured by the weight of the substance in possession whether pure, impure, or diluted. A quantity of a controlled substance is diluted if the substance consists of a detectable quantity of pure controlled substance and any excipient, fillers, or waste.

6-7-3-7 Delivery to law enforcement officer; deliver's duty to pay tax
Sec. 7. A person who delivers a controlled substance to a law enforcement officer is not relieved of the duty to pay taxes under this chapter.

6-7-3-8 Payment of taxes, when due; identification of person not required
Sec. 8. The tax imposed under this chapter is due when the person receives delivery of, takes possession of, or manufactures a controlled substance in violation of IC 35-48-4 or 21 U.S.C. 841 through 21 U.S.C. 852. A person may not be required to reveal the person's identity at the time the tax is paid.

6-7-3-9 Immunity from criminal prosecution; use of confidential information for prosecution
Sec. 9. The payment of the tax under this chapter does not make the buyer immune from criminal prosecution. However, confidential information acquired by the department may not be used to initiate or facilitate prosecution for an offense other than an offense based on a violation of this chapter.

6-7-3-10 Evidence of payment; required statement

Sec. 10. (a) The department shall issue evidence of payment of the tax to the person paying the tax. The evidence of payment must include a statement stating the following: "THIS EVIDENCE OF PAYMENT DOES NOT LEGALIZE THE DELIVERY, SALE, POSSESSION, OR MANUFACTURE OF A CONTROLLED SUBSTANCE. THE UNAUTHORIZED DELIVERY, SALE, POSSESSION, OR MANUFACTURE OF A CONTROLLED SUBSTANCE IS A CRIME."
(b) The evidence of payment is valid for forty-eight (48) hours after the payment is received by the department. A person who receives delivery of, takes possession of, or manufactures a controlled substance must also have a valid evidence of payment in the person's possession.

6-7-3-11 Failure or refusal to pay tax; penalty; class D felony
Sec. 11. (a) A person may not deliver, possess, or manufacture a controlled substance subject to the tax under this chapter unless the tax has been paid. A person who fails or refuses to pay the tax imposed by this chapter is subject to a penalty of one hundred percent (100%) of the tax in addition to the tax.
(b) A person who knowingly or intentionally delivers, possesses, or manufactures a controlled substance without having paid the tax due commits a Class D felony. This subsection does not apply to a person in violation of IC 35-48-4-11, if the violation is a Class A misdemeanor.

6-7-3-12 Rules
Sec. 12. The department may adopt rules under IC 4-22-2 necessary to enforce this chapter, including rules relating to the refunding of taxes paid under this chapter.

6-7-3-13 Assessment as jeopardy assessment; collection of tax
Sec. 13. An assessment for the tax due under this chapter is considered a jeopardy assessment. The department shall demand immediate payment and take action to collect the tax due as provided by IC 6-8.1-5-3.

6-7-3-14 Jeopardy assessments as secondary liens to seizure and forfeiture
Sec. 14. All jeopardy assessments issued for nonpayment of tax shall be considered a secondary lien to the seizure and forfeiture provisions of IC 16-42-20, IC 34-4-30.1, IC 34-4-30.5, and any federal law.

6-7-3-15 Controlled substance tax fund; creation, administration, and appropriation
Sec. 15. (a) The controlled substance tax fund is established to receive all the revenue collected by the department under this chapter.
(b) The fund shall be administered by the treasurer of state. Any expenses incurred in administering the fund shall be paid from the fund. Any interest earned on money in the fund shall be credited to the fund.
(c) Any revenue remaining in the fund at the end of a state fiscal year does not revert to the state general fund.
(d) Money in the fund is annually appropriated to cover the department's administrative and enforcement expenses under this chapter and to make the distributions required by

other statutory aspects that have subjected drug taxes to other constitutional attacks will be discussed.[210]

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this chapter.

6-7-3-16 Awards for information leading to collection of tax liability; use of money deposited in fund

Sec. 16. (a) The department may award up to ten percent (10%) of the total amount collected from an assessment under this chapter to any person who provides information leading to the collection of a tax liability imposed under this chapter. An award made under this subsection must be made before any other distributions under this section.

(b) Whenever a law enforcement agency provides information leading to the collection of a tax liability imposed under this chapter, the department shall award thirty percent (30%) of the total amount collected from an assessment to the law enforcement agency that provided the information that resulted in the assessment. The law enforcement agency shall use the money the agency receives under this chapter to conduct criminal investigations. A law enforcement agency may not receive an award under more than one (1) subsection.

(c) The department shall award ten percent (10%) of the amount deposited in the fund during each month to the law enforcement training board to train law enforcement personnel.

(d) The department may use twenty percent (20%) of the amount deposited in the fund during a state fiscal year to pay the costs of administration and enforcement of this chapter.

(e) Awards may not be made under this chapter to the following:

(1) A law enforcement officer.

(2) An employee of the department.

(3) An employee of the Internal Revenue Service.

(4) An employee of the federal Drug Enforcement Agency.

(f) All the money deposited in the fund that is not needed for awards or to cover the costs of administration under this chapter shall be transferred to the state drug free communities fund established under IC 5-2-10.

(g) An award made under subsection (a) or (b) shall be made on the basis of collections from each individual assessment that resulted from information supplied to the department by a person or law enforcement agency.

(h) Money shall be considered collected under this section only after all protest periods have expired or all appeals have been adjudicated.

6-7-3-17 Distributions and transfers; payments; certifications to state auditor

Sec. 17. (a) All distributions and transfers from the controlled substance tax fund shall be paid monthly by the fifteenth of the month following the month of collection.

(b) The department shall certify to the auditor of state the amount to be distributed to each law enforcement agency that is entitled to receive an award under section 16 of this chapter. The treasurer of state shall make the distributions upon warrants issued by the auditor of state.

210. *See* discussion *supra* Part I.C.

A. Provisions At-Risk for Double Jeopardy Analysis ("Inviting an Attack")

1. High Rate of Taxation.—In *Kurth Ranch*, the Supreme Court acknowledged that when looking at the collective value of the marijuana, the tax assessment, including the tax and the 100% penalty, was approximately four times the collective value.[211] The Court emphasized, however, that in looking at only the "shake"[212] portion of the marijuana, the tax assessment was over eight times the value of the lesser valued portion. Although the tax thought to be excessive in *Kurth Ranch* was $100 per ounce, in *United States v. Sanchez*[213] the Supreme Court did not find a $100 per ounce tax plus a 50% penalty to be excessive. Justice O'Connor noted in her dissent that at least twenty-two other state legislatures have determined this as an appropriate amount.[214] In addition, the Court has held double, treble, and even quadruple damages to be appropriate in some civil proceedings.[215] The question then becomes at what level does a state drug tax cross the line and become vulnerable to double jeopardy analysis?

The Montana statute was written to be the *greater* of $100 per ounce or 10% of street value.[216] The Court points out that the statute deals with a market value term for a product that cannot be legally sold, but then uses that same market value to determine that the tax is too high in proportion to the value.[217] Leaving the lower courts to grope for a threshold amount logically forces them to use market or street value, as the Supreme Court did, to determine when the tax crosses the line and transforms from a tax to a punishment.

Given the holdings of previously discussed cases, and the discussion of sin taxes that are imposed on legal products, a model provision prescribing the amount of tax should contain both a set amount *and* a percentage of *overall* market or street value, taxing the drugs on *the lesser of the two.* This Note suggests that the appropriate set amount is 80% of the value of the various controlled substances at the time the legislation is passed. For example, if one ounce of marijuana was valued at $100 when the legislation was passed, the set tax for one ounce of marijuana would be $80. In addition, *overall* market or street value should be set at 80%. By using an overall value, the problem of valuing the different portions of controlled substances is taken into consideration when computing the tax. This does not suggest that computation and determination of value is simple, but given the *Kurth Ranch* decision, these determinations must be made in either instance.

With the Court's emphasis on a proportionate dollar amount, the allowance for double and treble damages in civil awards, along with an acceptance for a strong governmental incentive against tax fraud, a penalty provision for failure to

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211. Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 1937, 1946 n.17 (1994).

212. Shake is a street name for the marijuana with lower street value. *See supra* note 194.

213. 340 U.S. 42 (1950).

214. *Kurth Ranch*, 114 S. Ct. at 1954 (O'Connor, J., dissenting).

215. *See supra* note 102 and accompanying text.

216. *Kurth Ranch*, 114 S. Ct. at 1941.

217. *Id.* at 1946-47.

pay the tax might be upheld as well. However, the safer approach would be to exclude any penalty provision. Nonetheless, this model statute will include a penalty clause that may not pass constitutional hurdles.

A model provision,[218] which is based on an adaptation of Indiana's provision dealing with the amount of tax on controlled substances,[219] would read as follows:

> Determination of amount of tax;
> Sec. ___. (a) The amount of the controlled substance excise tax is determined by the overall weight of the controlled substance as follows:
> (1) On each ounce of a schedule I, II, or III controlled substance, eighty dollars ($80) for each ounce and a proportionate amount for each fraction of an ounce *OR* 80% of the market value of the controlled substance, *whichever is least.*
> (2) On each ounce of a schedule IV controlled substance, eighty dollars ($80) for each ounce and a proportionate amount for each fraction of an ounce *OR* 80% of the market value of the controlled substance, *whichever is least.*
> (3) On each ounce of a schedule V controlled substance, eighty dollars ($80) for each ounce and a proportionate amount for each fraction of an ounce *OR* 80% of the market value of the controlled substance, *whichever is least.*
> (b) An ounce of a controlled substance is measured by the weight of the substance in possession whether pure, impure, or diluted. A quantity of a controlled substance is diluted if the substance consists of a detectable quantity of pure controlled substance and any excipient, fillers, or waste. However, any dilution of a controlled substance shall be taken into consideration in arriving at market value.
> Failure or refusal to pay tax; penalty;
> Sec. ___ A person may not deliver, possess, or manufacture a controlled substance subject to the tax under this chapter unless the tax has been paid. A person who fails or refuses to pay the tax imposed by this chapter is subject to a penalty of fifty percent (50%) of the tax in addition to the tax.

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218. This model will be based on a hypothetical presumption that the selling price of marijuana and all other controlled substances is $100 per ounce. This presumed price is needed to calculate the current fixed price portion of the statute.

219. IND. CODE §§ 6-7-3-6, -11 (1993). Clearly Indiana's provision as written, which provides for a tax of over $1,000 per ounce, would not, and did not withstand a double jeopardy challenge under *Kurth Ranch. See* Clifft v. Indiana Dep't of State Revenue, 641 N.E.2d 682 (Ind. Tax 1994), *aff'd in part, rev'd in part*, 660 N.E.2d 310 (Ind. 1995) (holding that the CSET does not violate the privilege against self-incrimination, the right of equal protection, or the right of due process, but is punishment for double jeopardy purposes pursuant to the *Kurth Ranch* decision). Additionally, Chief Justice Shepard writing for the Indiana Supreme Court noted in *Bryant* that a taxpayer who possesses the drug must repay the tax every forty-eight hours to avoid the CSET's additional sanctions. Bryant v. State, 660 N.E.2d 290 (Ind. 1995).

2. Payment of Taxes (Who Pays and When).—Other provisions facing double jeopardy assault are those that address when the tax is due and when it should be collected. In *Kurth Ranch*, the Supreme Court enunciated its concern that Montana's drug tax only applied to that class of individuals who had been arrested.[220] To provide as much protection from double jeopardy analysis as possible, a model statute should allow for the tax to be due immediately upon or even prior to possession or transfer of the drugs. The payment of the tax would be the responsibility of the taxpayer and would in no way be conditioned upon his or her arrest for any criminal offense.

The double jeopardy attack may still be difficult to overcome even if the imposition of tax after the arrest is omitted.[221] However, emphasizing and encouraging tax investigation, pursuit, and collection separate from and prior to any criminal investigation or arrest would further enhance the provision's ability to withstand the attacks.

Using Indiana's current provision for tax collection[222] and making appropriate modifications, a model provision would read as follows:

> Payment of taxes, when due;
> Sec. ___. The tax imposed under this chapter is due when the person receives delivery of, takes possession of, or manufactures a controlled substance in violation of _____ or 21 U.S.C. § 841 through 21 U.S.C. § 852 and may be paid in advance of such delivery, possession, or manufacture. Payment of the tax shall be pursued [by appropriate tax authorities] on all persons, regardless of the lack of arrest or criminal charges.

3. Preamble with Proper Intent.—The preamble to the statute was also alluded to by the Supreme Court in *Kurth Ranch* as an "unusual feature" which bolstered the Court's conclusion that the statute violated the Double Jeopardy Clause. Although the Court recognized the portion of the preamble indicating that payment of the tax did not give credence to any notion that manufacturing, selling, or using of drugs was legal or proper, this was not the critical portion in the preamble's demise. The practicality of taxing an illegal activity, which the Court agrees is still permissible, makes a preamble important, and failure to inform the taxpayer could be interpreted as an injustice. The Court recognized another area of Montana's preamble as more problematic, because it placed a burden on violators of the law as opposed to all citizens.[223] This reference to a burden on law violators would be avoided in a model provision such as the following:

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220. *Kurth Ranch*, 114 S. Ct. at 1941-42 (Montana's administrative rules even provided for law enforcement filling out the drug tax paperwork and submitting it within 72 hours of arrest).

221. The Indiana Supreme Court seemed to ignore the practicalities of collecting taxes on illegal goods by noting that, although the plain language of the statute did not limit the imposition of the tax to a time after arrest, the effect was to do so. *Bryant*, 660 N.E.2d at 290.

222. IND. CODE § 6-7-3-8 (1993).

223. *Kurth Ranch*, 114 S. Ct. at 1947.

> Whereas, dangerous drugs are commodities having considerable value and are part of a large and profitable business in the state of _____, the expense incurred by the state of _____ is indisputable. This legislation recognizes the economic impact upon the state of such activity and has drafted such legislation so as to generate revenues to offset the tremendous tax burden placed on the state of _____ due to the cost associated with such activity.[224]

B. Provisions At-Risk for Additional Constitutional Attacks

Prior to the *Kurth Ranch* holding, several statutes were challenged because they did not require the confidentiality of information obtained from the taxpayer. The self-incrimination problems stemming from an absence of a confidentiality provision caused other states to heed the warning and incorporate such provisions into their drug tax statutes. In addition, several of these states incorporated within their confidentiality provisions penalties for those who failed to comply with the confidentiality requirements.[225] Clearly, statutes containing these provisions would be less likely to be subjected to a self-incrimination attack. Such an inclusion would also bolster the argument that the state is genuinely seeking the revenues and not information for prosecution, further legitimizing the underlying reasons for the tax. In addition, the model should contain a clause prohibiting the use of any confidential information obtained except for a violation of the tax statute itself.

The following is a modification of Indiana's confidentiality provision[226] which provides a model for purposes of confidentiality:

> Identification of person not required
> Sec. ___ (a) A person may not be required to reveal the person's identity at the time the tax is paid.
> (b) Notwithstanding any law to the contrary, neither the [proper authority] nor a public employee may reveal facts contained in a report or return required by this chapter or any information obtained from a person under this chapter.
> (c) Any person violating this Code section shall be guilty of [a high misdemeanor, example in Indiana, a Class A Misdemeanor].
> Immunity from criminal prosecution; use of confidential information for prosecution
> Sec. ___ The payment of the tax under this chapter does not make the buyer immune from criminal prosecution. However, confidential information acquired by the department may not be used to initiate or

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224. More in-depth analysis should be done to determine what effect, if any, the sources that receive the funds have on the tax being perceived in a more punitive light.

225. GA. CODE ANN. § 48-15-10 (Supp. 1994); N.C. GEN. STAT. § 105-113.112 (1992) (each containing confidentiality provisions as well as a penalty for disclosure).

226. IND. CODE §§ 6-7-3-8 to -9 (1993).

> facilitate prosecution for an offense other than an offense based on a violation of this chapter.

Although far from a complete healing process, this model statute should provide some protection for states drafting or revising provisions of their state drug statutes to avoid "unusual features" and thus being deemed unconstitutional. At the very least, it will give them their best chance for survival.

CONCLUSION

In looking at the *Kurth Ranch* decision, one wonders how far the United States Supreme Court will go in continuing the confusion in double jeopardy jurisprudence. The Court wielded its "weapon" in the *Halper* decision. Rather than retreat from further double jeopardy madness, it chose to pursue another victim in *Kurth Ranch* and struck down the state drug taxes.

Justice Scalia, with wisdom for the future, pointed out that "'[t]he only function the Double Jeopardy Clause serves in cases challenging multiple punishments is to prevent the prosecutor from bringing more charges, and the sentencing court from imposing greater punishments, than the Legislative Branch intended.'"[227] He noted that the "Due Process Clause keeps punishment within the bounds established by the legislature, and the Cruel and Unusual Punishments and Excessive Fines Clauses place substantive limits upon what those legislated bounds may be."[228]

The future for state drug taxes, although not necessarily headed for extinction, is far from promising. States must have enough concern and optimism to view *Kurth Ranch* as a set-back and not a fatal attack. In revising current statutes or drafting new legislation, legislatures can refuse to allow those making huge profits on illegal drugs to pay less taxes than a young adult or teenager working at his or her first minimum wage job.[229]

Unfortunately the message that *Kurth Ranch* sends is loud and clear. One sentenced in a criminal matter should not also be expected to pay a tax although his or her very actions caused the expenditure of large amounts of both state and federal revenues. For the Double Jeopardy Clause to allow an individual to stand trial for the same criminal act in both a state and federal court,[230] and not allow an individual to be subject to both a civil and criminal proceeding where the legislature has authorized both appears illogical.

In the words of Justice Scalia, who initially voted with a unanimous Supreme Court in *Halper* but realized its egregious ramifications in *Kurth Ranch*, "[i]t is time to put the *Halper* genie back in the bottle."[231] Hopefully, there is enough

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227. *Kurth Ranch*, 114 S. Ct. at 1957 (Scalia, J., dissenting) (quoting Brown v. Ohio, 432 U.S. 161, 165 (1977)).

228. *Id.* at 1958 (Scalia, J., dissenting).

229. One wonders if state legislatures are motivated enough to do so, especially if state court decisions have viewed their previous attempts with a dim light.

230. *See supra* note 114 (discussing dual sovereignty).

231. *Kurth Ranch*, 114 S. Ct. at 1959.

room left in the bottle for *Kurth Ranch*.

WHEN THE WALLS COME A 'TUMBLIN' DOWN: A LOOK AT WHAT HAPPENS WHEN LAWYERS SIGN NON-COMPETITION AGREEMENTS AND BREAK THEM

DAYLON L. WELLIVER*

INTRODUCTION

An acrimonious argument, some sharp words, or doubt about the other's honesty; who knows how it all began or where it all will end? No, this is not a Note about marital discord or the start of global thermo-nuclear war. This Note will discuss what happens, and what should happen, when lawyers sign non-competition contracts that limit advertising, only to leave the firm later and break the contract.

First, it is not uncommon for companies, when hiring or training specially skilled employees, to require these employees to sign non-competition covenants. These covenants protect the company from the possibility that employees will leave and use information gained or contacts made while employed to compete against former employers. For example, the medical profession today widely uses non-competition contracts that prohibit doctors from leaving a practice to compete with it.[1] However, lawyers have enacted a self-policing rule that generally disallows non-competition contracts.[2] This has been done in the name of protecting client interests in having ready access to the lawyer of their choice, and, ostensibly, in giving the lawyer the right to practice law freely.[3] This issue has arisen in a number of contexts, but a relatively new decision approaches this subject in an interesting way.

In a recent case decided by the Indiana Court of Appeals, Third District, a personal injury firm with three offices began to split.[4] Sweeney and Pfeifer, two

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1. Michael G. Getty, *Enforceability of Noncompetition Covenants In Physician Employment Contracts: Confusion in the Courts*, 7 J. LEGAL MED. 235 (1986); Ferdinand S. Tinio, Annotation, *Validity and Construction of Contractual Restrictions on Right of Medical Practitioner to Practice, Incident to Employment Agreement*, 62 A.L.R. 3d 1014 (1975) [hereinafter *Contractual Restrictions on Right of Medical Practitioner*].

2. MODEL RULES OF PROFESSIONAL CONDUCT (MRPC) Rule 5.6 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY (MCPR) DR 2-108 (1980); ABA Comm. on Professional Ethics, Formal Op. 300 (1961); ABA Comm. on Professional Ethics, Informal Op. 1072 (1968); ABA Comm. on Professional Ethics, Informal Op. 1171 (1971). Most states have adopted either the Model Code or the Model Rules. GEOFFREY C. HAZARD, JR. ET AL., THE LAW AND ETHICS OF LAWYERING 13-16 (2d ed. 1994). *See also* Robert W. Hillman, *Law Firms and Their Partners: The Law and Ethics of Grabbing and Leaving*, 67 TEX. L. REV. 1, 18-20 (1988) (discussing "The Curious Demise of Restrictive Covenants"); Robert L. Schonfeld, Case Note, 4 FORDHAM URB. L.J. 195 (1975).

3. MRPC Rule 5.6 cmt. (1983).

4. Blackburn v. Sweeney, 637 N.E.2d 1340 (Ind. Ct. App. 1994), *trans. denied*, 659

of the original partners (hereinafter "Sweeney"), came into conflict with Blackburn, the other founding partner, and Green, a more recent partner (hereinafter "Blackburn"), over certain funds. Sweeney then filed for an accounting and dissolution of the partnership.[5] The original partnership agreements contained a non-competition provision that prohibited withdrawing lawyers from taking any personal injury file when they left.[6] In the first suit, the Allen Superior Court declared the provision void, ordered an accounting for each party, and dissolved the partnership.[7] The parties subsequently settled on a new agreement and stipulated to the dismissal of the pending litigation.[8] It is this new agreement that warrants close scrutiny.

In the new agreement, the parties set out a specific list of several counties for each group in which the other group could not advertise, either on air or in print.[9] However, not long after they reached this accord, Sweeney began airing television commercials in Blackburn's area.[10] After learning of this violation, Blackburn asked the court "for a declaratory judgment that the [a]greement was void and unenforceable."[11] Nevertheless, the trial court granted partial summary judgment for Sweeney.[12]

On appeal, the Third District reversed and directed a summary judgment on remand in favor of Blackburn.[13] The court could not find an analogous case; that is, a case with a non-competition clause between lawyers that limited advertising.[14] However, the court reviewed cases where attorneys entered into contracts with clauses that provided financial penalties or disincentives for lawyers who chose to leave and compete with the firm.[15] Many courts have struck down such agreements on the ground that, while they do not expressly restrict the practice of law, they do so in effect by creating a hardship for those who wish to practice law after leaving a firm.[16] The court concluded that limiting advertising, like a financial penalty, indirectly but effectively restrained the practice of law.[17]

N.E.2d 131 (Ind. 1995).

5. *Id.* at 1341.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 1341-42 & nn.1-2 (listing the counties to be divided).

10. *Id.* at 1342.

11. *Id.*

12. *Id.*

13. *Id.* at 1345.

14. *Id.* at 1343.

15. *Id.* at 1343-44 (this section of the opinion discusses both supporting and contrary cases in other jurisdictions).

16. *Id.*

17. *Id.* at 1344. This decision was vacated on other grounds by the Indiana Supreme Court in Blackburn v. Sweeney, 659 N.E.2d 131 (Ind. 1995), but the court expressly reserved judgment on whether the agreement violated Rule 5.6. *See infra* note 19.

In addition, the court compared this action to an anti-trust violation.[18] The court reviewed cases in other business settings in which the parties agreed to limit advertising. In those cases, the courts concluded that such agreements were an impermissible restraint of trade, because limiting advertising was "'inherently likely to produce anti-competitive effects.'"[19] This Note will not discuss this part of the decision at any length.

Was the *Blackburn* decision sound? This Note will deal with different aspects of this question. Part I will review the general validity of non-competition contracts in the law. Part II will compare the law's treatment of non-competition contracts generally with its approach concerning lawyers. Part III will address three issues. Subpart A will ask whether Rule 5.6, which prohibits agreements placing restrictions on the practice of law, really serves the public interest, or merely serves lawyers. Subpart B will discuss whether the legal community should retain the rule against restrictive covenants. Subpart C proposes a different outcome for cases like *Blackburn*, and considers a change to MRPC Rule 5.6.

I. GENERAL CONSIDERATIONS ABOUT NON-COMPETITION CONTRACTS

As a general rule, courts uphold non-competition covenants in other professions, as long as the covenants impose reasonable limitations.[20] In many

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18. *Blackburn*, 637 N.E.2d at 1343.

19. *Id.* at 1343 (quoting *In re* Massachusetts Bd. of Registration on Optometry, 110 F.T.C. 549, 605 (F.T.C. 1988)). This decision was taken collaterally to federal court in Blackburn v. Sweeney, 850 F. Supp. 758 (N.D. Ind. 1994), on the anti-trust issue, where the district court held that there was no per se violation, but that there might be a violation under the rule of reason. On appeal, the Seventh Circuit held that there was a per se violation due to horizontal restraint of trade, or an agreement between equal competitors in a certain market, and invalidated the agreement. Blackburn v. Sweeney, 53 F.3d 825 (7th Cir. 1995). It was on this basis that the Indiana Supreme Court, using the doctrine of comity, invalidated the agreement and reserved the Rule 5.6 issue for another day. *See supra* note 17. This author believes that the district court has the better-reasoned approach, because in no way did the parties have a significant share in the relevant market. *Blackburn*, 850 F. Supp. at 764. This argument is related to the discussion about whether the public is really disserved by a non-competition agreement due to the relative abundance of personal injury attorneys. *See infra* notes 78-92 and accompanying text. However, at least three judges on the Seventh Circuit disagree with this viewpoint, instead looking to the relative percentage of their own markets which were allocated, as opposed to looking at the percentage of the whole market. *Blackburn*, 53 F.3d at 828.

20. 54 AM. JUR. 2D *Monopolies* § 543 (1971) [hereinafter *Monopolies*] (and cases cited therein); 17 C.J.S. *Contracts* §§ 238, 246, 254 (1963) [hereinafter *Contracts*] (and cases cited therein); RESTATEMENT (SECOND) OF CONTRACTS § 188 (1981) (and cases cited therein). *See also* Standard Oil Co. v. United States, 221 U.S. 1, 51-58 (1911); Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625 (1960) (discussing the historical common-law development of post-employment restraints); Jill M. Mayo, Comment, *The Antitrust Ramifications of Noncompetition Clauses in the Partnership and Employment Agreements of Doctors*, 30 LOY. L. REV. 307, 308-14 (1984).

employment situations, employers require employees to sign non-competition clauses as a condition of their employment contract. This happens more frequently in situations where the employee may acquire certain specialized skills from the employer, or where the employee may become privy to important business contacts or trade secrets.[21]

In these circumstances, non-competition provisions protect the employer's interest in the business he has built by preventing departing employees from using the training or knowledge gained from the employer to either start their own business or to work for a competitor. Conversely, the reasonableness limitation protects the employee's interest in working by limiting the restriction on his or her ability to work. The reasonableness requirement also protects the public's interest in having access to the services of the former employee.

An analysis of non-competition covenants and the reasonableness requirement will lay a foundation of the general rules regarding non-competition contracts. By setting out the basic structure of analysis, this discussion will demonstrate how lawyers' non-competition covenants could also fit into this doctrine, obviating the need for a strict provision such as MRPC Rule 5.6.[22]

A. Non-Compete Agreement Usually Valid

In *Ruhl v. F. A. Bartlett Tree Expert Company*,[23] a Maryland court enforced a non-compete contract that placed restrictions on an employee of a tree-trimming company who had acquired some training and customer contacts from his employment. This restriction covered only a six county region (the area in which the employee had worked as area manager) for a period of two years.[24] The court found that even though the employee's only training was in the field of tree-trimming, the restrictions were reasonable, and justified an injunction against the employee to prevent him from operating his own business.[25] This decision balanced employer and employee interests.

In another Maryland case, *Millward v. Gerstung International Sport Education, Inc.*,[26] the employee already had name recognition in the community. However, he had developed many contacts essential to the business by working

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21. Phillip J. Closius & Henry M. Schaffer, *Involuntary Nonservitude: The Current Judicial Enforcement of Employee Covenants Not to Compete—A Proposal for Reform*, 57 S. CAL. L. REV. 531, 532 (1984) (referring to the increased appearance of non-competition covenants in highly technological business settings).

22. MRPC Rule 5.6 states in relevant part, "A lawyer shall not participate in offering or making . . . a partnership or employment agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement . . . ." MRPC Rule 5.6 (1983).

23. 225 A.2d 288 (Md. 1967).

24. *Id.* at 290.

25. *Id.* at 291-94.

26. 302 A.2d 14 (Md. 1973).

for the company.[27] His contract restricted his employment for two years after leaving, and covered only the city of Baltimore and its surrounding counties.[28] When he left, he used these contacts to compete with his former employer, and the court held the non-competition contract enforceable because it protected a valid employer interest in those contacts, and because it had specific reasonable limitations.[29]

Non-competition contracts have been upheld against professionals as well. In one California case, *Swenson v. File*, the court validated portions of a non-competition agreement in an accounting firm which stayed within proper, or reasonable, parameters.[30] In many cases, such contracts have been upheld against accountants.[31] Courts generally recognize that although the clients have an interest in the services of the accountant of their choice, as long as the contract limitations are reasonable, no undue damage occurs to justify invalidation of the contract.[32]

Of particular interest, in a professional context, are non-competition covenants in the medical field. Doctors parallel lawyers in some areas crucial to considering the wisdom of enforcing non-competition contracts against them. First, doctors, like lawyers, perform services vital to the functioning of modern society. In fact, in this regard, people generally use a doctor's services more often than a lawyer's. Although neither the American Medical Association nor the American Bar Association has conducted surveys on nation-wide use of their respective professions' services, common-sense suggests that more people see doctors than see lawyers in their professional capacities. Every person is subject to illness or accident, while not everyone is automatically subject to legal action and indeed many people rarely, if ever, consult a lawyer. Accordingly, it would better serve the public, in preserving access to an essential service, to prohibit non-competition contracts between doctors than it would to prohibit lawyers from entering non-competition contracts. Nevertheless, it is common practice for doctors to enter into these agreements and for courts to uphold them.[33]

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27. *Id.* at 17.

28. *Id.* at 15.

29. *Id.* at 17.

30. 475 P.2d 852, 857-58 (Cal. 1970).

31. *See* Annotation, *Enforceability of Covenant Against Competition in Accountant's Employment Contract,* 15 A.L.R. 4th 559 (1982) (discussing a number of cases that have enforced or refused to enforce non-competition contracts against accountants). These covenants are also fairly prevalent in highly technological settings. *See* Closius & Schaffer, *supra* note 21, at 532 n.2 (giving a number of sources to support this proposition). The rationale is the same, but the employer's interest in protecting knowledge gained by the employee is even more important, because knowledge is often the essence of a technologically-based business. *See also Monopolies, supra* note 20, §§ 554-64 (discussing several other areas of employment in which reasonable restrictive covenants have been upheld, including dentists, income tax specialists, managerial staff, a soil engineer, salesmen, and other skilled employees).

32. *See, e.g.,* Smith, Batchelder & Rugg v. Foster, 406 A.2d 1310, 1312 (N.H. 1979) (discussing this factor as the third prong of the reasonableness test).

33. Getty, *supra* note 1, at 235. *See also* Canfield v. Spear, 254 N.E.2d 433 (Ill. 1969); Hall

A second and important factor in upholding physician non-competition contracts is the need to protect the employer's interest in keeping his patients.[34] Although it would seem detrimental to deny the patient access to a doctor who has familiarity with his medical history, that factor is rarely considered in the decisions.[35] Apparently, as long as the doctor is allowed to serve some sector of the public interest, a specific patient's interest in consistent medical care is not a factor. At least one court has found that if the contract is reasonably limited, so as to allow the doctor to practice in some other capacity or area, then the public interest is served.[36] Thus, the employer's interest in keeping his patients outweighs the specific patient's interest in keeping his doctor, as long as the general public interest is not harmed.

Third, as long as a contract falls within the court's determination of reasonableness, then the employee/doctor's interest in work will also be protected to a certain degree. Because these non-competition contracts cannot generally be unlimited as to time, place, or area of practice, the doctor retains the opportunity to work in his chosen profession, if not in the exact location or practice which he would prefer.

However, the cases regarding lawyers seem to turn this reasoning on its head. In the physician examples, the business' interest is protected to a limited extent.[37] However, in the lawyer cases, the employer's business interest is subordinated to the public interest in the lawyer's services, the prior clients' interest in having the same lawyer handle his legal matters, and the lawyer's right to practice law unrestrained. This Note will examine these policies in detail later.[38]

B. Defining Reasonableness

It is well established that non-competition agreements in the employment context are valid as long as they are reasonable.[39] There are several factors on which courts base such decisions: the employer's business interests, the employee's right to work, and the public interest in the service.[40] Additionally, most courts seek to place some limit on the duration, geographical area, and scope

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v. Willard & Woolsey, P.S.C., 471 S.W.2d 316 (Ky. Ct. App. 1971); Ellis v. McDaniel, 596 P.2d 222 (Nev. 1979) (non-competition contracts between doctors at least partially valid); Geocaris v. Surgical Consultants, 302 N.W.2d 76 (Wis. Ct. App. 1981) (non-competition covenant held invalid because unreasonable).

34. Mayo, *supra* note 20, at 307 nn.1-2.

35. *But see* Gomez v. Chua Medical Corp., 510 N.E.2d 191, 196-98 (Ind. Ct. App. 1987) (Sullivan, J., concurring, joined by Garrard, J.). This decision criticizes non-competition covenants between physicians as a denial of essential services to the public, thus disserving the public interest.

36. *Canfield*, 254 N.E.2d at 435.

37. Mayo, *supra* note 20, at 307 & nn.1-2.

38. *See infra* notes 77-94 and accompanying text.

39. *Contracts, supra* note 20, §§ 240, 241(1), 246.

40. RESTATEMENT (SECOND) OF CONTRACTS § 188 cmts. a-c (1981); *Monopolies, supra* note 20, §§ 544-49; *Contracts, supra* note 20, §§ 246-47 .

of activity restraints that many non-competition contracts contain.[41] Finally, many courts hold that these agreements may be no more restrictive than necessary to protect the employer's interest.[42]

The common-law reasonableness approach has the strengths and weaknesses inherent in the application of a rule of reason in any context. It provides flexibility to accommodate the factually sensitive nature of these issues and allows judges to fit the judgment to concerns of justice and equity.[43] However, this also means that very few decisions are certain and it may be difficult for litigants to know their rights in advance, or to determine when to settle.

The reasonableness requirement, although maligned by some,[44] still dominates courts' discussions of non-competition contracts.[45] Reasonableness as a requirement seeks to balance all relevant interests in the ability or inability of the employee to work.[46] This approach attempts to avoid any undue inequities while upholding both parties' rights to freedom of contract.[47]

This limitation has served a valuable purpose, and seems to have worked. Using the medical field as an example, there is no apparent dearth of doctors today, except in some rural areas, and this lack is not due to the use of restrictive covenants in those areas.[48] No mass revolution has broken out over patients having to switch doctors when their doctor leaves. Doctors are still considered among the top wage-earners in our society, even if they are sometimes forced to work in another area. Finally, in practical effect, this enables employers to protect

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41. RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. d (1981); *Monopolies, supra* note 20, § 544-49; *Contracts, supra* note 20, § 247.

42. *See* Laconia Clinic, Inc. v. Cullen, 408 A.2d 412 (N.H. 1979); *Contractual Restrictions on Right of Medical Practitioner, supra* note 1, at 1039-40.

43. Koger Properties, Inc. v. Adams-Cates Company, 274 S.E.2d 329 (Ga. 1981) (holding a non-competition covenant that contained an indefinite area clause invalid as vague and unreasonable). *But see* Hunter v. North American Biologicals, 287 So. 2d 726 (Fla. Dist. Ct. App. 1974) (holding a non-competition covenant valid that contained an unspecified, and therefore unlimited, area clause).

44. *See* Getty, *supra* note 1, at 237 (an example of one author who criticizes the reasonableness approach).

45. *Contracts, supra* note 20, §§ 240, 241(1), 246.

46. *See, e.g.*, Ellis v. McDaniel, 596 P.2d 222, 224 (Nev. 1979); Hansen v. Edwards, 426 P.2d 792 (Nev. 1967).

47. *Ellis*, 596 P.2d at 224.

48. Many newspapers and magazines document the lack of medical services in rural or inner-city areas. In the many articles this author has surveyed, none mention restrictive covenants as a factor. Instead, most blame economic or systemic failures, or burn-out due to workload. *See, e.g.*, Dan Hurley, *Med Students Put Price on Primary-Care Career*, CHI. SUN-TIMES, Mar. 23, 1994, at 56; W. Henson Moore, *Health Care: Struggling With the Thorny Issues*, WASH. POST, Aug. 18, 1994, at A20; Donald E. Pathman et al., *Medical Education and the Retention of Rural Physicians*, HEALTH SERVICES RES., Apr. 1994, at 39; Richard Wolf, *In South Dakota, Problem is Plain - Too Few Doctors: State Typifies the Problems of Medical Care in Rural Areas*, USA TODAY, Feb. 18, 1994, at 7A.

their client base to some extent.[49]

The reasonableness test could serve the same functions in the legal context. It could take into account all relevant interests, weigh them accordingly, and protect the public by putting some limitations on the extent of the contract.

II. NON-COMPETITION AGREEMENTS AMONG LAWYERS

The validity of non-competition agreements, as upheld if reasonably limited,[50] does not apply to the same types of agreements among lawyers today.[51] Lawyers are often held to what almost amounts to a per se rule prohibiting non-competition contracts.[52]

In one case, the law firm and stockholders (members of the firm) entered into an agreement which would pay deferred compensation to shareholder-attorneys that left the firm unless they continued to practice law.[53] The court held that, "[t]he financial disincentive in leaving [a firm] . . . to practice law elsewhere works an impermissible restriction under DR 2-108."[54]

In an Oregon case, *Hagen v. O'Connell, Goyak & Ball, P.C.*, the attorney-plaintiff was a shareholder in the legal corporation.[55] The corporation had a buy-sell valuation agreement which stipulated that any departing shareholder who failed to sign a non-competition agreement must sell his stock to the remaining shareholders with a 40% reduction in the price.[56] The court found that this provision worked to restrict the withdrawing partner's practice of law by creating a financial barrier, and was void as against the public policy that legal counsel must be available as the client desires.[57]

In *Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg*,[58] the Iowa Supreme Court went a step further. There, the agreement did not even mention a non-competition clause, but merely provided that if "the withdrawing partner 'committed an act which is detrimental to the partnership which affects the value of the remaining partners' interest in the partnership,'" then the remaining partners could substantially reduce the buy-out price of his interest.[59] The partners determined that the departing lawyer injured those remaining by leaving a lucrative area of the firm and taking a majority of the clients with him, and then

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49. *See* Mayo, *supra* note 20, at 307 & nn.1-2.

50. *See supra* Part I.

51. *See* MRPC Rule 5.6 (1983); MCPR DR 2-108 (1980).

52. MRPC Rule 5.6; MCPR DR 2-108. Note that although these are generally blanket provisions, there is an exception with regard to conditions on retiring lawyers receiving pension compensation, which the rule allows.

53. Spiegel v. Thomas, Mann & Smith, P.C., 811 S.W.2d 528 (Tenn. 1991).

54. *Id.* at 531 (DR 2-108 is the MCPR provision prohibiting restrictive covenants).

55. 683 P.2d 563 (Or. Ct. App. 1984).

56. *Id.* at 564.

57. *Id.* at 565.

58. 461 N.W.2d 598 (Iowa 1990).

59. *Id.* at 599.

sought to enforce the clause in the partnership agreement.[60] The court held that this constituted, in effect, a restriction on the practice of law and thus violated the rules of professional responsibility, even though the agreement made no express provision conditioning payment on entering into a non-competition contract,[61] as was the case in *Hagen* above.[62]

In *Blackburn v. Sweeney*,[63] the Indiana Court of Appeals based its decision on two grounds. First, it found that the cases mentioned above closely paralleled the case sub judice.[64] Although the cases the court analyzed dealt with financial penalties or disincentives, the court analogized those cases to the case at hand which limited advertising. In ruling under MRPC Rule 5.6 (the provision prohibiting restrictive covenants), Judge Staton wrote, "[w]e believe the provision at issue here poses a similar risk of abuse. A nonadvertisement agreement indirectly, but effectively, limits the pool of attorneys from which potential clients may choose."[65]

The court also examined a second line of cases that dealt with agreements which restricted advertising in other business settings. Under this analysis, the court noted an alternative reason to support invalidating the contract: that of an impermissible restraint of trade closely akin to an anti-trust violation.[66] However, this Note will not discuss that issue in any detail.

III. CRITIQUES AND PROPOSALS

This Part will criticize the *Blackburn* decision on two grounds. First, the court in *Blackburn* applied MRPC Rule 5.6 in a narrow and formalistic manner and did not allow for flexible decision-making based on modern-day considerations. Second, on a broader scope, this Part will criticize the rule of professional conduct on which the decision is based. Not only is the rule often too narrowly construed by courts, but the rule itself exempts lawyers from the common-law rules that other segments of society are forced to obey. This rule is self-serving and its underlying attitude engenders vehement anti-lawyer sentiment from the public. Finally, this Part will proprose a solution for the problem. This solution could either take the form of a reconstructed rule, or return to the common-law rules used in other settings.

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60. *Id.* at 600.

61. *Id.* at 601-02.

62. Hagen v. O'Connell, Goyak & Ball, P.C., 683 P.2d 563, 565 (Or. Ct. App. 1984).

63. 637 N.E.2d 1340 (Ind. Ct. App. 1994). *See supra* notes 4-19 and accompanying text for a summary of the relevant facts.

64. 637 N.E.2d at 1343-44.

65. *Id.* Note that, although the Indiana court ruled under the *Indiana* Rules of Professional Conduct, Indiana's Rule 5.6 is identical to the MRPC Rule 5.6. This Note refers to it as the Model Rule in order to avoid confusion.

66. *Id.* at 1343. *See supra* note 19 for a brief discussion of the anti-trust issue.

A. Blackburn v. Sweeney: Decision Under MRPC Rule 5.6

Assuming arguendo that the rule applied by the court in *Blackburn* is good policy, the court should not have construed it so strictly. Some courts have approached the problem from a more flexible standpoint. One example is the California Supreme Court decision in *Howard v. Babcock*.[67] In that case, the partners had signed a partnership agreement that forced withdrawing partners, who subsequently worked in competition with the firm in liability insurance defense within a certain area, to forego some portion of their withdrawal benefits.[68] The amount forfeited depended upon the particular area in which the departing partners worked and on how many partners left to form a practice together.[69]

The court held "that an agreement among law partners imposing a reasonable toll on departing partners who compete with the firm is enforceable."[70] Although the court remanded the case to the trial court to determine if the particular agreement was reasonable, it recognized that some agreements could be limited enough in scope so as not to unduly restrict the practice of law.[71] In this way the court used a flexible interpretation of the word "restrict" to weigh all relevant interests and to arrive at an equitable solution.

Conversely, the court in *Blackburn* found that the activity of limiting advertising did unduly restrict the practice of law and read the rule strictly, almost as a per se standard.[72] It is debatable from a practical standpoint whether this provision truly restrained the practice of law. The court called it an indirect but effective restriction.[73] The provision did not prevent the lawyers from representing clients from the designated "no-advertising" areas, so clearly it did not directly restrain the lawyer's ability to practice. What then did it restrain?

It could be that by limiting the potential clients who might consult the lawyer, the lawyer is restrained from representing clients in the restricted area. Because those clients would effectively be prevented from finding the lawyer, he could not represent them. This view would hold that although the clause does not expressly prohibit representation, it indirectly does so. The Comment to MRPC Rule 5.6 states that a non-competition covenant "limits [the lawyer's] . . . professional autonomy."[74] This argument seems attenuated and should not be extended.

If a lawyer signs a non-competition covenant barring practice in New York while he practices in California, technically it is a restriction on the practice of law. But does it really restrict anything if that lawyer never works or intends to work in New York? By the same token, if a lawyer in South Bend, Indiana, is prohibited from advertising in Jasper, Indiana, does it really restrict his practice if

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67. 863 P.2d 150 (Cal. 1993).
68. *Id.* at 151.
69. *Id.*
70. *Id.*
71. *Id.* at 156.
72. Blackburn v. Sweeney, 637 N.E.2d 1340, 1343 (Ind. Ct. App. 1994).
73. *Id.* at 1344.
74. MRPC Rule 5.6 cmt. (1983).

he normally conducts no business in Jasper? While these hypotheticals are ridiculous from a practical view, they point out that just because a provision prohibits a certain activity, it does not necessarily restrict a lawyer's practice. For example, in *Blackburn*, the attorneys retained different offices after the split, thus minimizing the possibility that they would serve any significant number of clients from the others' areas.[75]

In *Blackburn*, one provision of the dissolution agreement held that one set of lawyers would essentially take over the practice in one area while the other set would operate the offices in another area.[76] Because the firm had offices in different areas, it would seem natural to divide the partnership in this way. Sweeney, in operating an office in one area, likely would not have served many clients in the other area anyway. Therefore, this limitation probably did not impinge in any meaningful sense either party's practice of law. Further, the court did not even consider the argument that this agreement somehow restricted the lawyer's right to practice. In looking beyond the comment to MRPC Rule 5.6, the court essentially said that the only true policy for this rule was to insure the public's access to legal services.[77]

The next contention is that the agreement possibly restrained the general public who resided in the area subject to the advertising ban from knowing about, and consequently hiring, the prohibited group.[78] MRPC Rule 5.6, in its comment on this point, states that a restrictive agreement "limits the freedom of clients to choose a lawyer."[79] This could be seen as an injury to the public interest in having ready access to legal counsel in general, or to the particular lawyer of their choice.

The public's general interest in having ready access to legal counsel, and the effect that advertising has on that interest, has been discussed at great length in another context. In *Bates v. State Bar of Arizona*,[80] the Supreme Court of the United States had much to say about the detrimental effects of a ban on advertising legal services or representation. In this case, the Court dealt with an Arizona Supreme Court rule (adopting MCPR DR 2-108) that constituted essentially a blanket prohibition of advertising by lawyers.[81] Two lawyers advertised the general types of law that they practiced and the average fees they charged for certain standardized services.[82] The state bar association brought a disciplinary

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75. *Blackburn*, 637 N.E.2d at 1341.

76. *Id.* Although this is never expressly mentioned, it is reasonably inferred from the division of the advertising area, the fact that Blackburn had originally operated the Ft. Wayne and Lafayette offices while Sweeney operated the South Bend office, and the testimony from Sweeney at trial to the effect that in a practical sense the practice had been divided along those lines beforehand. *Id.* at 1341-42, 44.

77. *Id.* at 1343 (citing Jacob v. Norris, McLaughlin & Marcus, 607 A.2d 142, 146 (N.J. 1992)).

78. *Id.*

79. MRPC Rule 5.6 cmt. (1983).

80. 433 U.S. 350 (1977).

81. *Id.* at 355.

82. *Id.* at 354, 385.

action against both attorneys for violating the rule.[83]

The Court found that when services are not generally advertised in a truthful fashion, especially in a field of service where the average consumer is likely to have little experience or knowledge, the public may be effectively denied access to those services.[84] This point was well-taken, particularly in light of the fact that the public at the time of the decision was generally unaware of the availability of or prices charged for legal representation.[85]

However, that does not appear to be the problem today, especially in personal injury law, where advertising seems to have risen to an all-time high. The problem regarding the lack of advertising in the field in which both Sweeney and Blackburn practiced simply does not exist today. One need only turn on the television to a local station or open the Yellow Pages to see the truth of this statement. The Court would not, by enforcing this agreement, deny the public knowledge of the accessibility and general affordability of legal services. Another possible concern of the Court could have been that the public would be deprived of the services of a particular lawyer or lawyers. This draws some interesting parallels to the way some courts have addressed the issue of the practice of medicine.

In one case involving medical practitioners, a Nevada court faced a situation where a doctor practiced orthopedic surgery in a rural area.[86] He had formerly practiced with a group of doctors, no other member of which was an orthopedic specialist.[87] When he sought to leave the group and practice in the immediate area, the other doctors sought to enforce the non-competition agreement against him.[88] The court held that because no other doctor practiced orthopedic medicine, the clause was too restrictive and the clinic had no genuinely protectible interest in those services.[89] Second, and more germane to this discussion, the court found that patients needing the services of an orthopedic specialist would have to travel great distances to receive these services if the court enforced the non-competition

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83. *Id.* at 356.

84. *Id.* at 370.

85. *Id.* at 370 & n.22. The policies implied by the Court closely parallel the policies as proposed by the Comment to MRPC Rule 5.6. The primary policies behind allowing attorney advertising are: 1) to allow attorneys the chance to truthfully advertise their services under the Commercial Speech Doctrine and the First Amendment, and 2) to promote wider access to legal services for the public. *Id.* at 363-64. The policies for MRPC Rule 5.6 are: 1) that the lawyer be allowed to practice law as he or she desires, and 2) that the public have access to the lawyer of their choice. MRPC Rule 5.6 cmt. Much could be said about the intersecting of these two policies, but that is beyond the scope of this Note. It is worth noting that the comments to MRPC Rule 7.2, which the ABA promulgated after the *Bates* decision, focus on the accessibility of legal services to the general public but ignore the right to freely practice law. MRPC Rule 7.2 cmt. [1].

86. Ellis v. McDaniel, 596 P.2d 222, 223 (Nev. 1979).

87. *Id.* at 224.

88. *Id.* at 223.

89. *Id.* at 224.

covenant.[90] Thus, the public interest in a specialized service outweighed the clinic's interest in protecting its business.[91]

In contrast, in an area as populated as those in which both Blackburn and Sweeney practiced, there was no lack of personal injury lawyers.[92] If these two lawyers had been the only practitioners of this type of law in the immediate area and the residents were in need of such services, it would be a different situation. But such was not the case, and it would be unreasonable to argue that the public had a specific interest in the services that these lawyers provided.

Another argument is that the long-term clients of one of these lawyers would have an interest in retaining his or her services. However, as pointed out earlier, there was no provision in the agreement limiting who could be represented, just a provision that geographically restrained advertisement. Therefore, long-term clients who wished to retain a certain lawyer for reasons of stability and confidence in that lawyer's ability and in their relationship may have done so.[93]

Furthermore, although continued representation is an important right for loyal clients of a lawyer, having to find a new attorney would not necessarily mean disaster. While a new lawyer would be unfamiliar with the client generally and the case specifically, as long as there were other lawyers who competently practiced in the areas in which the client needed legal counsel, the client could still receive adequate representation. The example of doctors discussed above shows this well. It would seem as important, if not more so, to a medical "client" to have consistent medical care, especially in cases of prolonged conditions or sensitive medical problems, as it would for a legal client to have consistent legal representation.

However, in the situation of a doctor, as in *Ellis*, if there is no specific need for his specialty, then clients are not unduly injured by the removal of his services. This facet of non-competition agreements fits into the previous discussion on the public interest in the specialized skills of the lawyer at issue. As long as potential clients can receive adequate legal representation, then their right is not sufficiently injured to warrant the invalidation of a contract entered into freely.[94]

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90. *Id.* at 225.

91. *Id.*

92. In general there is not a lack of lawyers today. In a recent study, the ratio of general population to lawyers has gone from 790 to 1 in 1947-48, to 320 to 1 in 1990-91. The raw number of lawyers for the same two periods of time are 169,489 and 777,119, respectively. *Legal Education and Professional Development - An Educational Continuum*, 1992 A.B.A. SEC. OF LEG. ED. AND ADMISSIONS TO THE BAR 14-15.

93. See the Conclusion of this Note discussing how, in working out a new rule on lawyer post-employment restraint contracts, any rule should take into account the interests of any particular client who, for whatever reason of confidentiality or preference, would desire to retain that lawyer's service. This should be a central concern and limitation on the enforceability or reasonableness of non-competition covenants.

94. *See Ellis*, 596 P.2d at 224 (although the public has an interest in promoting competition, "it also has an interest in protecting the freedom of persons to contract, and enforcing contractual rights and obligations").

B. Should The Legal Profession Retain the Rule Against Lawyers' Restrictive Covenants?

Having considered how courts generally apply MRPC Rule 5.6, or its counterpart MCPR DR 2-108, the next question is whether this rule is warranted or serves the purposes that have been presented for its adoption.

Is the rule against restrictive agreements one that rests on sound public policy considerations? The two major policies behind MRPC Rule 5.6, as announced in the comments thereto, were the rights of lawyers to practice and the right of the public to have free access to legal counsel of their choice. There are many problems inherent in the right to legal services rationale advanced by the rule.[95]

It is hard to construct a convincing argument that restrictive agreements in fact cause irreparable harm to the public interest. Of course, courts should not diminish the right of the public to have access to legal services, because this is essential to uphold justice for the average citizen. Equally compelling, and perhaps the best rationale for the rule, is the aversion to treating clients like property.[96] At no time should the legal community slip into a mentality that treats clients in the same way divorcing spouses treat the house, car, boat or family pet. However, the causal link between allowing reasonable restrictive agreements, accounting for the public's interest in the lawyer's specific services, and the downfall of the legal system is not tenable.

Assuming that non-competition contracts injure the public good by denying essential services to the people, then we should do away with these contracts for all essential service providers. There should be some consistency in the law and the enunciated policies behind precedents that, although decided in substantially similar circumstances, come to radically different conclusions.[97] However, because there is no demonstrated injury to the public welfare by enforcing these covenants against other important service providers, it is hard to understand how enforcing them against lawyers would injure the public.

Conversely, non-competition covenants may even serve clients' interests. As the court in *Howard* noted, "Law firms have an affirmative obligation to the client to provide an atmosphere most conducive to the development of the attorney-client relationship and to the efficient, diligent completion of work."[98] Allowing lawyers

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95. *See supra* notes 78-94 and accompanying text for a discussion of these problems.

96. *See* Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg, 461 N.W.2d 598, 601 (Iowa 1990).

97. *See* Canfield v. Spear, 254 N.E.2d 433 (Ill. 1969) (upholding a restrictive covenant against a doctor). *But see* Blackburn v. Sweeney, 637 N.E.2d 1340 (Ind. Ct. App. 1994), *trans. denied*, 659 N.E.2d 131 (Ind. 1995) (striking down a restrictive covenant against a lawyer based on a strict public policy prohibiting such covenants).

98. Howard v. Babcock, 863 P.2d 150, 159-60 (Cal. 1993) (quoting Kirstan Penasack, Note, *Abandoning the Per Se Rule Against Law Firm Agreements Anticipating Competition: Comment on* Haight, Brown & Bonesteel v. Superior Court of Los Angeles County, 5 GEO. J. LEGAL ETHICS 889, 890-91 (1992)).

to leave at will can disrupt the prompt attention clients deserve, or can make firms unwilling to invest money in areas of practice if partners are likely to move laterally to another firm and substantially undercut the prior firm's business in that area.[99] If the law would promote a stable environment within a firm, a client may avoid potential dilatory action on the part of the firm when the lawyer handling their matter leaves to practice elsewhere.

Concerning a lawyer's right to freely practice law, why should lawyers have a right that other learned professionals do not? This kind of rule seems to serve only the legal profession. Although there is an argument that it only protects those who want to leave and not the firm that hired them, thus not protecting all lawyers, this rationale alone does not account for the moral or ethical impact of such a rule. Such a rule says to the profession as a whole, "You are an elite group of learned scholars who are above the law that others must follow because of your position in society." This is exactly the reverse of the attitude that the profession ought to have.

Because lawyers have such an impact on achieving justice for the average citizen who might not otherwise have meaningful resort to a court of law in resolving a dispute, the rules for lawyers should be construed so as to substantially protect citizens. Lawyers should not be exempt from the very law they seek to enforce. People may tend to distrust lawyers if the average citizen perceives that lawyers are above the law. Although the current rule is couched in phrases that promote protecting the right of the citizen to legal services, in effect it does not do so. The proponents of this rule can point to no evidence that it actually accomplishes the goal of maintaining access to legal services. They can only point to theory. Instead, the rule is one which allows a lawyer to leave a firm at his own discretion and damage the interest of his employer at will.[100] In this situation, in accordance with *Blackburn* and *Jacob*, it seems as though the truly compelling rationale for the rule is the protection of the public (clients).

Another consideration is polishing the tarnished image that lawyers have in society today. Although the general public is probably not aware of the specific prohibition against non-competition covenants and how this exempts lawyers from agreements to which others are usually held, this kind of rule encourages an attitude of superiority and a kind of legal hubris. While the problem runs much deeper than this single rule, this is, in a sense, a symptom of the problem. The profession as a whole needs to re-examine the structure of its mores and ethical

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99. *Id.*

100. It should be noted that there is some check on the departing lawyer's freedom to injure his employer when he leaves. Although clients are generally free to leave the firm to continue receiving representation from the lawyer, in many instances the lawyer is not free to write letters or in other ways directly solicit the clients to draw them away from the firm. *See* Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 393 A.2d 1175 (Pa. 1978) (limiting the departing lawyer's ability to steal clients from the firm by restraining him from writing solicitation letters to former clients); Opinion 80-97 (1980), *summarized in* ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT 801:2303 (allowing a non-compete clause which prohibits direct solicitation of former clients); MCPR DR 2-103(A).

code and begin to question the validity of rules such as this one.

The consideration of enhancing the legal profession's image presents an interesting juxtaposition to the *Bates* decision. In *Bates*, the Court supported the idea that lack of advertising breeds disillusionment among the public because they perceive "the profession's failure to reach out and serve the community."[101] However, allowing lawyers to advertise freely under the facts of *Blackburn* would allow an exemption that, while not common knowledge to the man on the street, puts the legal profession on a pedestal and fosters the same kind of elitist attitude that the Court deplored in *Bates*. This could be resolved through some type of compromise.[102]

One principle found in many areas of the law is that those who are well-informed as to the consequences of their actions are in a better position to assume the risk inherent in those acts. This principle then leads to a paradox. Today the law upholds non-competition covenants against all types of employees, from tree-trimmers to doctors, accountants to computer technologists. However, the one group exempt from these contracts is the legal community, which is in the best position to know the ramifications of signing a contract and to understand legal terminology.[103] This result is at best counter-intuitive and at worst self-serving and arrogant.

C. Proposals for Change

First, it would not mean the destruction of civilization as we know it if we simply did away with the rule. At least one state has already done so, although it has been too recent to see any appreciable effects of the change.[104]

Second, and possibly in addition to the first proposal, the courts could repeal the rule and return to the common-law scheme of using reasonableness as the benchmark.[105] This would subject lawyers to the same rules as all other professions and avoid the kind of hostile scrutiny that the profession has too often received. This would also help generate feelings among the legal community that, even though the profession has a long and honorable history, this fact should not create an exemption from the rules imposed on the rest of society. Rather, lawyers' elevated position means that they should be subject to a higher standard

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101. Bates v. State Bar of Arizona, 433 U.S. 350, 370 (1977).

102. *See infra* notes 104-11 and accompanying text discussing options for a suitable compromise.

103. *See* Canfield v. Spear, 254 N.E.2d 433 (Ill. 1969). "When the agreement was signed the defendant, a professional man some 30 years of age and holding degrees from a university was hardly incompetent to look out for his own interests. . . . He has accepted the benefits of the contract and must take the burdens as well." *Id.* at 434-35.

104. Opinion 92-126 (1992), *summarized in* ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT 1001:4203 (stating Maine's decision not to adopt this rule).

105. *See* Glenn S. Draper, Comment, *Enforcing Lawyers' Covenants Not To Compete*, 69 WASH. L. REV. 161, 180-81 (1994); Penasack, *supra* note 98 , at 909-12. Both articles support the use of the reasonableness standard in lawyers' non-competition covenants.

of ethical behavior.

There is an argument that it would be unethical to allow lawyers to limit their access to the public realm. There are two points involved here. First, this contention assumes that such contracts will become prevalent enough to have some sort of impact. The further assumption is that firms will be able to dictate that all new associates sign these or risk not being hired. This is purely conjectural. Second, even if the first point is valid, the assumption is that these agreements will have a deleterious effect on the public. In reality, non-competition contracts have not injured the public in other professions and it seems unlikely that allowing reasonable agreements among lawyers would have any ill effects on the average citizen.[106]

Another approach would be to imitate the California courts' use of the rule. In *Howard*, the court construed the term "restriction" using a flexible approach, recognizing that not every limiting provision in a post-employment non-competition contract substantially restricts the practice of law.[107] Using a broader interpretation, courts could achieve more equitable results by using common-sense notions of what truly restricts a lawyer's practice without blindly prohibiting these covenants.

Third, the ABA or other governing bodies could revise the rule to allow more discretion in drafting and upholding these agreements. To draft a new rule, let us first look at the present one and then draw possible comparisons. MRPC Rule 5.6 states in relevant part: "A lawyer shall not participate in offering or making: (a) a partnership or employment agreement that restricts the right of a lawyer to practice after the termination of the relationship, except an agreement concerning benefits upon retirement . . . ."[108]

As with any code or statutory provision, there are a number of ways to change the meaning of the text, either by slight addition or subtraction of a word, or by total revision. One possible way of redrafting this code provision would be to insert the word "substantially" before "restricts."[109] The drafters could explain in a comment that this addition means that agreements which are not substantial restrictions would be allowed. They could add several "substantial" factors, including the public's interest in that particular lawyer's services, his long-term clients' interest in stability of legal representation, the employer's protectible interest, and the employee's interest in working. Examples of allowable provisions could be agreements not to directly solicit the specific clients of the firm, or prohibitions on informing clients, in a letter telling them of the lawyer's withdrawal, of the reasons for the lawyer's departure.[110] These provisions parallel,

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106. *See supra* notes 84-94 and accompanying text.

107. Howard v. Babcock, 863 P.2d 150, 156 (Cal. 1993) (stating that these agreements do not restrict the practice of law but attach economic consequences to a lawyer's choice to compete).

108. MRPC Rule 5.6 (1983).

109. *Cf.* LAWYER'S CODE OF CONDUCT Rule 8.13 (1982) (the comparable provision of the American Trial Lawyers Association's alternative code that uses the language "unreasonably restricts").

110. Opinion 80-97 (1980), *summarized in* ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL

in restrictiveness, agreements not to advertise within definite and limited areas.

Another possible way to redraft this rule would be to leave "substantially" in as above, but then to reconstruct 5.6 (a) as follows:

> A lawyer shall not participate in offering or making:
> (a) a partnership or employment agreement that substantially restricts the right of a lawyer to practice after termination of the relationship, except:
> (1) an agreement concerning benefits upon retirement; or
> (2) an agreement which would restrict clients that the lawyer has already served from continuing his or her representation; or
> (3) an agreement which would deprive the surrounding community of important specialized services that the lawyer provides.

These examples represent two possible methods of redrafting the rule. Provisions like these could be further explained, in the comments, regarding the inherent policy considerations. The comments could approach these problems from a balancing perspective, accounting for all relevant interests.[111]

There are several possible methods of dealing with the tensions inherent in the rule. The above suggestions are proposals to generate a discussion of the rule. It would behoove the legal community to re-evaluate its position on these agreements and the implications they carry for the profession.

CONCLUSION

As a general rule, post-employment restrictive agreements are allowed if they fall within reasonable parameters. Drawing the boundaries, although an inexact science, usually depends upon the use of a balancing test. Among the general factors the courts weigh are the public's interest in those services, the employee's interest in working in his or her chosen profession, and the employer's protectible business interest. In addition, courts tend to favor covenant provisions that contain limitations on duration, geographical area, or the scope of activity covered by the restrictions. Finally, most courts state that the covenant can be no more restrictive than necessary to protect the employer's interest.

CONDUCT 801:2303 (limitation on direct solicitation of clients); Opinion 89-29 (1989), *summarized in* ABA/BNA LAWYER'S MANUEL ON PROFESSIONAL CONDUCT 901:4324 (prohibiting the lawyer from mentioning the reasons for leaving the firm in a general letter telling the clients of his withdrawal from the firm).

111. The provisions of MCPR DR 2-108 could be redrafted in a similar fashion for those jurisdictions that have retained the Model Code of Professional Responsibility instead of adopting the Model Rules of Professional Conduct. Engaging in the exercise of proposing changes to the current rule, I acknowledge that at least one other author has done so. *See* Penasack, *supra* note 98, at 913-14. However, while the use of the word "substantially" is not a concrete one, I believe that it would be easier to apply with explicit comments or specific exceptions enumerated in the code than would Ms. Penasack's proposal. In addition, the use of the word "substantially" is more congruous with the language of the Model Rules, which uses the modifier extensively and even includes it among the definitions. *See* MRPC Terminology [10].

This is true even among highly trained or specialized professions, such as accountants or professionals involved in technological fields. One analogous example, in several key respects, is the medical field. Often non-competition contracts are upheld against doctors as long as they contain reasonable restraints. Doctors parallel lawyers in several important respects, particularly in the relative importance and prestige that each profession enjoys. Because the public at large has an interest in access to these services, courts must carefully consider the validity of restrictive agreements in these fields.

Contrary to the usual validity of doctors' agreements, which are upheld if reasonably limited, lawyers have enacted a self-policing rule that prohibits restrictive agreements, based on policy considerations that protect the public's access to these crucial services and protect the lawyer's right to practice law freely.

To accomplish these stated goals, most courts seem to impose a strict rule that any provision which directly or indirectly restricts the practice of law is void. However, not all courts have agreed that this provision, or others similar to it, must be enforced as a strict, almost per se, rule. Some courts, notably the California Supreme Court, have used a flexible interpretation.[112] One state has even abolished this rule altogether,[113] suggesting that it is not absolutely crucial to the existence of our modern legal system.

The assumptions that undergird the rule are subject to challenge as well. It is not clear that the rule serves to protect a substantial right of the public. It is also not clear why a lawyer's right to practice law should be protected to a greater extent than any other professional's right to practice in their profession. In fact, because lawyers are in the best position to know the implications of their legal rights in signing a contract, they should be held to the commitments they have made. In a sense, they have a better capacity to consent to this waiver of their right to work. Enforcing them against other professions and trades while exempting those in the legal profession is contradictory and unfair. In talking to the Pharisees, "Jesus replied, 'And you experts in the law, woe to you, because you load people down with burdens they can hardly carry, and you yourselves will not lift one finger to help them.'"[114]

In evaluating whether this rule should continue, there are two considerations. First, are the goals of this rule valid? Second, given that these policies seem to have support in the eyes of the law and society, does the rule as currently applied further those policies in a fair manner? This is where the rule is subject to substantial scrutiny.

This rule can be criticized on several grounds. First, it is unclear whether the rule even works to secure the goals it promotes. It does not injure the public to enforce restrictive agreements in other professions, thus it should not injure the public to enforce the same contracts among lawyers. Second, a flexible rule might even serve the clients of the lawyer or firm better by providing a stable work atmosphere to efficiently handle the client's concerns. Third, lawyers have a

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112. *See supra* notes 67-71 and accompanying text.

113. *See supra* note 104.

114. *Luke* 11:46 (New International Version).

significant duty to provide the public access to justice and should not have a rule that thumbs its nose at the standards which the public must follow. Fourth, by re-evaluating this rule, the profession will re-examine its dominant mores and ethical standards. This self-scrutiny can only help to raise the public's perception of the profession from current popular disfavor. Fifth, by promoting a rule that roughly parallels the law in other professions, it will promote consistency in the law.

The courts have several options for changing the rule. They could simply abolish the rule and adopt the common-law or reasonableness approach generally in use today among other professions. They could also choose to construe the word "restriction" more flexibly to allow room for reasonably limited covenants. Finally, the body that oversees lawyer discipline in each jurisdiction could redraft their current rule.

In a situation like *Blackburn*, a provision which allows lawyers to limit their advertising to definite and limited areas would fit within the confines of reasonableness. It would not prohibit lawyers from representing particular clients, and as long as their services were not so specialized that the community at large has a significant interest in those skills, the general public would not be injured.

It is in the best interest of the legal profession to examine this rule, its policies, and its effectiveness in depth. At a time when lawyers are receiving strong criticism, this old and scholarly profession should turn its talents inward to resolve a conflict that is symptomatic of other problems and serves only the profession. It is like the old Biblical saying: "Physician, heal yourself."[115]

115. *Luke* 4:23 (New International Version).